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**REPORTS**  
**OF**  
**CASES ARGUED AND DETERMINED**  
**IN THE**  
**SUPERIOR COURT**  
**OF THE**  
**CITY OF NEW YORK.**

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**BY**  
**SAMUEL JONES AND JAMES C. SPENCER,**  
**REPORTERS OF THE COURT.**

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**NEW YORK SUPERIOR COURT REPORTS,**  
**VOL. XLII.**

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**VOL. X.**

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*Rec. March 20, 1878*

JUDGES  
OF THE  
SUPERIOR COURT  
OF THE  
CITY OF NEW YORK,  
DURING THE TIME OF THIS VOLUME OF REPORTS.

---

WILLIAM E. CURTIS,  
*Chief Justice.*

JOHN SEDGWICK,  
HOOPER C. VAN VORST,  
GILBERT M. SPEIR,  
CHARLES F. SANFORD,  
JOHN J. FREEDMAN,  
*Justices.*





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**CASES ARGUED AND DETERMINED**  
**IN THE**  
**SUPERIOR COURT**  
**OF THE**  
**CITY OF NEW YORK.**  
**AT GENERAL TERM.**

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**BROWN & BROTHERS, PLAINTIFFS AND RESPONDENTS, v. SAMUEL W. TORREY, DEFENDANT AND APPELLANT.**

**MANUFACTURING CORPORATION.      LIABILITY OF ITS STOCKHOLDERS, &c., &c.**

A stockholder claimed to be liable for debts, &c., who has himself signed the note, which is the subject of the action, as an officer of the company, *is estopped* from setting up a want of power in the officers to make the note (*Moss v. Averill*, 10 N. Y. 459).

The act of 1853,—providing for the purchase of property by the issue of stock for the same,—does not change the effect of the law of 1848, as regards the filing of the certificate of the payment of the whole of the capital stock. The same requisites as to verification of the fact and public notice, are necessary, of the fact of the issue of paid up stock for property, in order to relieve the stockholder from liability.

The creditors' rights are not affected by a contract between the company and its president, of which they had no notice or knowledge.

Before CURTIS, Ch. J., and SPEIR, J.

*Decided January 2, 1877.*

VOL. X.—1

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Opinion of the Court, by CURTIS, Ch. J

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Appeal by the defendant from a judgment entered upon the report of a referee.

*R. W. Hawkesworth*, and *B. C. Chetwood*, for appellant.

*E. New*, for respondents.

BY THE COURT.—CURTIS, Ch. J.—The defendant is sued as a stockholder in the Sewing Machine Engine Company, to recover the amount of two promissory notes, made by the company and delivered to the plaintiffs, in payment for goods sold and delivered to the company by the plaintiffs. The notes were signed by the president of the company, and also by the defendant as its treasurer, and made payable to the plaintiff's order, and dated May 18, 1874. The goods for which they were given were sold and delivered to the company between January 16, and April 15, 1874. This action was commenced September 26, 1874. The defendant became a stockholder and treasurer of the company in the autumn of 1873, and continued so until after the notes in suit were given. Judgments were recovered on these notes against the company in September, 1874, and executions were issued and returned unsatisfied.

The certificate of the payment of the whole of the capital stock, required to be made and recorded in order to exonerate stockholders from liability, pursuant to the requirements of sections 10 and 11 of chapter 40 of *Laws of* 1848, was not made and recorded until October 18, 1875,—more than a year after the commencement of the present action.

The defendant urges, that no authority is shown in the officers of the company to make the notes; but as he himself signed them as treasurer of the company, and thus held them out to the public as valid securities,



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Opinion of the Court, by CURTIS, Ch. J.

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he is estopped from now setting up a want of power to execute them (*Moss v. Averill*, 10 *N. Y.* 449).

The defendant further claims, that the certificate required to be made and recorded by the act of 1848, was not necessary in this case, and that, where the trustees of a company proceed to purchase property and issue stock therefor, and comply with chapter 333, section 2, *Laws of 1853*, in that respect, a certificate is dispensed with, but the facts should be stated in all statements or reports made by the company, and that, if that is done, the stockholders are not liable.

In an annual report dated July 10, 1873, it is stated that stock to the full amount of the capital was issued as full paid stock, for the use of certain patent rights, under which the company operated. This was not verified, except by the secretary, and was never recorded.

This cannot be construed into a compliance with the statute, as it fails in both the requisites, the verification, and the public notice, required of the certificate, and would be of no use for the protection of the public, and accomplishing the object of this provision of the law. The act of 1853 did not change the effect of the law of 1848 as regards the filing of the certificate (*Boynton v. Andrews*, court of appeals, not yet reported).

The defendant excepts to the finding of the referee, that the whole amount of the capital stock had not been paid in. It becomes unnecessary, in the view taken of the case, to consider this question of fact, but the evidence appears to sustain this finding of the referee.

The plaintiffs' rights are unaffected by the contract between the company and its president, as they had no notice of it. The plaintiffs had the right also to sue Place & Co., the indorsers of the notes, and who also acted as agents in the purchase of the goods, without disclosing the name of their principal at the time.

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Statement of the Case.

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The certificate of the county clerk that no certificate by the company was on file, or recorded, was competent (2 *R. S.* [Edmonds' Ed.] 573, 612,) and the fact was also proved by the testimony of a witness.

There are other exceptions in the case, but none that call for the reversal of the judgment.

The judgment appealed from should be affirmed with costs.

SPEIR, J., concurred.

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MARCUS KOHNER, PLAINTIFF, v. SUSANNAH  
A. HIGGINS AND JOHN O. HIGGINS, DE-  
FENDANTS.

CONTRACT FOR EXCHANGE OF REAL ESTATE.

In a contract between parties for the exchange of real estate, where each party covenants to take property subject to a mortgage of a specified amount, "and to give a good warranty deed with full covenants, and free from all incumbrances except the mortgage specified," a tender of a deed by one party that contained after the *habendum* clause the following words, "subject, however, to a mortgage (describing the same fully) which said mortgage, with the interest, &c., the party of the second part *hereby and by the acceptance of these presents assumes and agrees to pay*," is not a fulfillment of the contract. It is clearly a departure from the provisions of the contract, for it places the party to whom it was tendered in a different position in respect to the payment of the mortgage than if the deed had simply conveyed the property subject to it, and the party offering such deed was left in the position of having made no tender.

If a party from bad faith or any other motive or cause, tenders a deed that openly or covertly varies in its terms from that called for by the preliminary contract, the fact that the vendee may not discover it or may not specifically point out the objection, when so tendered, does not place the party in any better position than if the objection had been made.

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Statement of the Case.

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In a contract of this character the covenants are mutual. The act to be done by one, is the consideration for the act to be done by the other; and consequently neither can maintain an action for non-performance against the other, until he has performed or offered to perform his part of the contract (*Morris v. Sliter*, 1 *Den.* 59; *Williams v. Healy*, 3 *Id.* 363).

Before CURTIS, Ch. J., and SPEIR, J.

*Decided January 2, 1877.*

In this case the complaint was dismissed, and the exceptions were ordered to be heard in the first instance at the general term. The action was brought to recover damages for failure to perform a contract for the sale and conveyance of real estate situate in the city of New York.

The plaintiff and defendants entered into an agreement, dated March 18, 1874; whereby the plaintiff agreed to *sell* to the defendants a certain house and lot in Sixty-first street, for the sum of twenty-eight thousand dollars, which the defendants agreed to pay as follows: to take the property subject to a mortgage of sixteen thousand dollars, and to give for the balance a house and lot on Fiftieth street, subject to a mortgage of six thousand five hundred dollars, "and to give a good warranty deed with full covenants, free from all incumbrance, except the mortgage;" and the plaintiff covenanted "on receiving such payment at the time and in the manner mentioned," to deliver a deed of the premises in Sixty-first street, free from all incumbrances except the sixteen thousand dollar mortgage.

The plaintiff in his complaint alleges, that he duly tendered a deed in pursuance of such contract, of the house and lot in Sixty-first street, and demanded of the defendant a deed of the house and lot in Fiftieth street in pursuance of the contract, but that defendants could not give such deed in consequence of certain covenants

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Opinion of the Court, by CURTIS, Ch. J.

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and restrictions, to which the property was subject, and by reason thereof, failed to perform their agreement.

The answer denies the tender, and alleges that defendants were ready and willing to complete the contract, and tendered a deed in conformity with the same, which was refused by the plaintiff, who on his part also further refused to deliver a deed of the house and lot in Sixty-first street in pursuance with the terms of the contract.

*Eugene L. Bushe*, for plaintiff.

*A. S. Diossy*, for defendants.

BY THE COURT.—CURTIS, Ch. J.—The evidence shows that the deed which the plaintiff claims he tendered to the defendants, contained after the *habendum* clause these words :

“Subject, however, to a mortgage thereon to the North America Life Insurance Company for sixteen thousand dollars and interest, dated June 16, 1870, and recorded in the office of the register of the city and county of New York, in liber 964 of mortgages, page 352, *which said mortgage, with the interest to grow due thereon, the party of the second part hereby and by the acceptance of these presents assumes, and agrees to pay.*”

This was clearly a departure from the provisions of the contract. The effect of this change was to place the defendants in a different position in respect to the payment of the mortgage, than if the deed had simply conveyed the premises subject to it. The deed tendered was not in accordance with the contract of sale, and the plaintiff was left in the position of having made no tender. If a vendor chooses from bad faith, or any other motive, to tender a deed that openly or covertly varies in its terms from that called for by the preliminary contract, the fact that the

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Opinion of the Court, by CURTIS, Ch. J.

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vendee may not discover it, or may not specifically point out the objection when so tendered, does not place the party tendering the instrument in any better position.

The plaintiff claims that, to maintain his action, it was unnecessary for him to make any tender whatever, of a deed of the Sixty-first street premises, for the reason, that performance by the defendants was a condition precedent, and that he was not called upon to tender his deed to the defendants until after they had made payment, and that, by the terms of the contract, payment and conveyance were not concurrent.

This is not the theory upon which the complaint is drawn, and is not the interpretation placed upon the contract by the parties.

The covenants in the contract between the parties are mutual. The act to be done by the one is the consideration for the act to be done by the other. Both parties are to perform at the same time and place. It is apparent that these covenants must operate as mutual conditions, and consequently neither party can maintain an action, until he has performed or offered to perform, his part of the contract (*Morris v. Sliter*, 1 *Den.* 59; *Williams v. Healy*, 3 *Id.* 363).

The plaintiff's exceptions should be overruled, and judgment rendered dismissing the complaint with costs to the defendant.

SPEIR, J., concurred.

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Statement of the Case.

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CHARLES KNOX, PLAINTIFF AND RESPONDENT,  
v. DAVID HEXTER, DEFENDANT AND APPELLANT.

LANDLORD AND TENANT.

The tenant has the right to insist that unless he can have the whole premises leased, he will take nothing and pay nothing; but if he accepts and occupies a part during the term, he becomes liable to pay (upon the principle of a *quantum meruit*) for that which he has actually occupied under the lease.

This principle governs the decision of this case at general term, and also in *Hurlbut v. Post*, 1 Bos. 28, confirmed in *Kelsey v. Ward*, 38 N. Y. 83.

In the case at bar, the reasonable value of the premises *occupied* under the lease, should have been submitted to the jury.

Before CURTIS, Ch. J., and SPEIR, J.

*Decided January 2, 1877.*

Appeal by the defendant from a judgment in plaintiff's favor, upon a verdict for seven thousand one hundred and seventy-three dollars and seventy-five cents.

*Stephen A. Walker*, for appellant.

*John M. Scribner, Jr.*, for respondent.

The defendant was lessee of the plaintiff of the hotel comprising the old Prescott House and an adjoining house, No. 97 Spring street, occupied as part of the hotel; and, the plaintiff being desirous of taking down the houses 97 and 99 Spring street, the defendant relinquished possession of 97 Spring street, on receiving from the plaintiff, on April 28, 1871, a new lease, by which the old hotel building, and the five upper stories of the new building to be erected on the lots 97 and 99



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Opinion of the Court, by CURTIS, Ch. J.

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Spring street, were demised to him for eight years from May 1, 1871, at the yearly rent for the whole, of twenty-two thousand five hundred dollars, payable quarterly, the new building to be finished and possession thereof to be given to the defendant, on or before September 1, 1871. The lease contained a covenant by the plaintiff for quiet enjoyment. Through default of plaintiff, the new building was not finished nor possession given to the defendant till after November 1, 1871.

This action was brought to recover five thousand six hundred and twenty-five dollars, for one quarter's rent reserved by said lease, from August 1 to November 1, 1871. The defense was the neglect, delay and refusal of the plaintiff to finish or give possession of the five upper stories of the new building, containing sixty rooms, till long after November 1, 1871.

Before this action came on for trial, the defendant, by leave of court, put in a supplemental answer, setting up the fact that the defendant recovered a judgment against the plaintiff in this court for his damages in an action in which Hexter had alleged a breach of several of the covenants of the lease, among others, of the covenant to finish and give possession of the new buildings, and Knox had set up in his answer a counter-claim for the rent sued for in the present action.

At the trial, the jury, under the direction of the court, rendered a verdict for the plaintiff for the amount of a quarter's rent and interest.

BY THE COURT.—CURTIS, Ch. J.—The recovery by the defendant, Hexter, of damages in a former suit against Knox, for the latter's default in not giving him in time, the possession of a portion of the demised premises, does not render Hexter liable for rent of that portion of which he was thus deprived by Knox. The result of sustaining such a liability would be, that if

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Opinion of the Court, by CURTIS, Ch. J.

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Hexter, never having had possession at all, had recovered damages from Knox for withholding the possession, he would still be liable to Knox for rent.

The verdict and judgment record in the former action do not operate as a bar to the prosecution of the plaintiff's claim in the present action. It is true, the present plaintiff, Knox, set up in the former action this very claim for rent by way of counter-claim against the present defendant Hexter, but this counter-claim was withdrawn during the trial, and was in no respect submitted to, or passed upon by the court or jury. On the contrary, the court expressly charged the jury, that they had nothing to do with it, and it is shown that neither the judgment record nor the verdict embraced this claim. From these circumstances, it accords with justice, and the decisions of the courts, that the plaintiff should not be deprived of prosecuting his present claim, by reason of the proceedings in the former action (*East New York & J. R. Co. v. Elmore*, 53 *N. Y.* 524; *Kerr v. Hays*, 35 *Id.* 331; *Wood v. Jackson*, 8 *Wend.* 1; *Foster v. Milliner*, 51 *Barb.* 385; *Burwell v. Knight*, 50 *Id.* 267).

In the present action, the plaintiff sues to recover a quarter's rent, during two months of which quarter, the defendant was deprived of the possession of a part of such premises, by the default of the landlord in not having them completed for occupation. The defendant entered into possession of the residue, and also of the remaining portion, when completed, and occupied the whole, and thereafter paid the rent for the succeeding quarters. The case is not one where the lessor evicts the tenant from a part of the premises, or where a part is recovered by title paramount to the lessor's, nor is it a case where rent is suspended, until possession of such part from which the tenant is wrongfully evicted is restored by the lessor, because, in the present case, there has been no possession by the lessee of the part

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Statement of the Case.

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withheld or eviction by the lessor, that can be a basis for a restoration by the latter.

In the case before us, it seems a harsh rule, that would compel the tenant to pay rent for that part of the premises he has not been able to occupy by reason of the landlord's default, and at the same time, it would be equally severe to hold that where the tenant does not refuse, but takes possession of the premises agreed to be leased, that the default of the landlord should utterly bar his action upon the contract.

The rule of law is not so inequitable, as to either party. The tenant has the right to insist that unless he can have the whole premises, he will pay nothing, and take nothing; but if he occupies a part during the term, he becomes liable to pay, upon the principle of a *quantum meruit*, for that which he has actually enjoyed. This principle governed in *Hurlbut v. Post*, 1 Bos. 28, and is confirmed in *Kelsey v. Ward*, 38 N. Y. 83.

In this view of the question, the case below should have been allowed to go to the jury, as to what was the reasonable value of the part occupied.

The judgment appealed from should be reversed, and a new trial granted with costs to abide the event.

SPEIR, J., concurred.

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EDWARD LYNCH, SURVIVOR, RESPONDENT, v.  
JOHN PYNE, APPELLANT.

EVIDENCE.

When the testimony of a party to the action at the trial is fully contradicted by his own letters, written at a time when the facts were fresher in his memory than at the time of the trial, his testimony is entitled to no consideration (*Boyd v. Colt*, 20 How. Pr. 384).

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Opinion of the Court, by CURTIS, Ch. J.

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The case presented (appeal from an order denying the defendant's motion for a new trial on the judge's minutes) is one where the court must pass upon the weight of conflicting evidence (*Finch v. Parker*, 49 N. Y. 1).

Before CURTIS, Ch. J., and SPEIR, J.

*Decided January 2, 1877.*

Appeal from an order denying the defendant's motion for a new trial on the judge's minutes.

*Geo. W. Curtis*, for appellant.

*M. J. A. McCaffery*, for respondent.

BY THE COURT.—CURTIS, Ch. J.—The plaintiff sues to recover for work claimed to have been performed at the request of the defendant, and for plants and flowers furnished to the defendant, between January 3, 1870, and April 30, 1872.

The main question presented by the case is, whether the work was performed for the defendant, and the flowers and plants furnished to him or his wife at his request. The defendant and his wife lived with Mr. Cambreleng, during this period, in the house owned by the latter, and to which a conservatory and a garden were attached. Mr. Cambreleng, who was the father of the defendant's wife, died June 24, 1872.

The plaintiff testifies that sometimes the defendant and his wife, and sometimes one or the other, ordered the flowers and plants in question, and that he charged them on his books to the defendant's wife, and sent the bill to him, and that he called on the defendant with the bill on several occasions, but that he never promised to pay it personally.

The plaintiff called a witness who testified that he called on the defendant many times in relation to the

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Opinion of the Court, by CURTIS, Ch. J.

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bill, when he would sometimes say: "I can't do anything to-day," or would answer affirmatively when asked by witness if he should call again. But as the defendant was at this time the executor of Mr. Cambreleng's estate, it may have been that he was answering in that capacity, especially as the plaintiff was seeking to collect this same claim from that estate, and to its liability for which no question was raised. It appears that this estate was insolvent.

The defendant testified, that he did not order these plants or flowers, and that the only transaction he ever had with the plaintiff's firm, was the purchase of a boquet, fifteen years previously, which he paid for; that he never authorized the trusting of his wife, or knew of it; that no bill was made out to her until after her father's death; and that she attended to her father's commissions, he being advanced in years, such as making purchases for the house; and that he had heard him direct her to go and order plants, but that he never knew her to do so except for her father. The defendant also testified that no bill was ever made out against him, and that when he first received the bill made out against his wife, he notified the plaintiff that it was improperly made out against her, and that it should be made out against Mr. Cambreleng.

In examining the testimony of the plaintiff (for it will be observed that the case rests chiefly upon the testimony of the two parties), there are some circumstances that do not tend to sustain the statements of the plaintiff at the trial. For instance, the defendant, on June 23, 1873, wrote plaintiff's firm the following letter:

"NEW YORK, June 23, 1873.

"Messrs. BRIDGEMAN & Co.

"Dear Sirs: I am not aware that any of the articles in your bill were ordered for me or on my credit. Your bills have always been made out, rendered to,

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Opinion of the Court, by CURTIS, Ch. J.

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and paid by Mr. Stephen Cambreleng, and were for work done in, and plants furnished to his garden and conservatory, No. 35 Great Jones street, which plants were appraised as part of his estate. There was a bill for these very articles rendered in Mr. Cambreleng's lifetime, made out to him, as every bill ever rendered by you was made out to him, and the only account ever kept by you was with him. I shall resist firmly any attempt to make me liable for any goods or labor furnished or alleged to have been furnished by you to Mr. Cambreleng, or for his house and garden. Your claim, if any, is against Mr. Cambreleng's estate, and has been already made against his estate.

"Yours truly,

"J. PYNE."

In answer to that note, the case admits that the plaintiff sent the following letter:

"NEW YORK, June 26, 1873.

"JOHN PYNE, Esq.

"Dear Sir: You have mistaken the tenor of our note, in supposing that we expected to make you liable for the bill. Not at all. The bill *is, as you say*, against the estate of Mr. Stephen Cambreleng, and the reason why we wrote and sent to you, was for the reason that knowing you to be one of the executors, you might be able to satisfy us in regard to the payment; as being *very short* at present, and having waited so long, we thought that probably the estate was in such a condition now, as to admit of the payment of the bill. We hope you will consider us right in this matter, and as soon as the estate will be in a condition for payment, notify us, and you will greatly oblige

"Yours respectfully,

"BRIDGEMAN & Co."

This last communication appears to be an explicit



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Opinion of the Court, by CURTIS, Ch. J.

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disavowal of any claim against the defendant personally for the bill, and was written at a time when the facts were fresher than at the trial, in the memory of the plaintiff. This seems to bring the case within the principle, that where a party's oath is flatly contradicted by his own letters written long previous to the commencement of the action, it is entitled to no consideration (*Boyd v. Colt*, 20 *How. Pr.* 384).

The next circumstance affecting the plaintiff's testimony, arises from the affidavits made by him in the usual form, September 1, 1873 (two months and more after writing the last letter), to substantiate his claims upon the estate of Mr. Cambreleng. By these, he confirms under oath his statement in the letter, that this bill in controversy was a claim against the estate of Mr. Cambreleng. The plaintiff stated at the trial, that he knew the claim was against Mr. Pyne, and believed that he had no claim against Mr. Cambreleng, none whatever, but that he made the affidavits at the defendant's request, and that he took the latter to be an honorable man, and that on his statement that he would get some money, he felt justified in making the affidavits.

It is probably not the first time that a claim has been sworn to and presented against the estate of a deceased person from that motive, but I am not aware that any court has held it a justification for a knowingly false affidavit.

There are some other features in the case, that strengthen the defendant's testimony, that the bill was Mr. Cambreleng's, besides the letter and affidavits of plaintiff. It is conceded that, in July, 1871, Mr. Cambreleng's note at ninety days for \$220.90, being for a part of this bill, was taken by the plaintiff, and subsequently protested.

Plaintiff's firm had attended to Mr. Cambreleng's garden, and supplied plants for his house and conser-

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Statement of the Case.

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vatory for a long term of years, before the bills in question were incurred, and these latter were originally made out in his name. No charge appeared on the plaintiff's books against the defendant personally.

The case presented is one where the court must pass upon the weight of conflicting evidence (*Finch v. Parker*, 49 *N. Y.* 1). The result of the examination is a conviction that the verdict of the jury cannot be sustained.

Under such circumstances the judgment must be reversed, and a new trial ordered with costs to abide the event.

SPEIR, J., concurred.

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ELISE MAGNIN, AND OTHERS, PLAINTIFFS AND  
APPELLANTS, v. WILLIAM B. DINSMORE,  
PRESIDENT OF THE ADAMS EXPRESS COMPANY,  
DEFENDANT AND RESPONDENT.

CARRIER AND SHIPPER. THEIR RELATIONS, &c.

A concealment by the shipper of the true value of the goods shipped, or his silence alone, discharges the carrier from liability for ordinary negligence (See this case in court of appeals, 62 *N. Y.* 35 to 46).

The court of appeals declined to hold, however, in this case, that such an exoneration would reach the defendant (the carrier), where his acts, or those of his servants and agents, in relation to the goods, amounted to misfeasance or abandonment of his character as carrier, but reversed the judgment and ordered a new trial on the point stated above.

On the new trial upon the same record and evidence, the court charged the jury that if the loss occurred through gross negligence, or misfeasance in regard to, or abandonment or conversion of, the property by the carrier, he was liable. The jury found

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Opinion of the Court, by CURTIS, Ch. J.

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a verdict against the carrier for the full value of the property. The judgment entered was reversed on appeal by the general term of this court, because of error in the charge, and a new trial ordered. On this last trial the verdict for fifty dollars, and the judgment thereon was in accordance with the views of this court at general term, as it interpreted the decision of the court of appeals, and is now affirmed, but leave given to the defendant to appeal therefrom to the court of appeals.

Before CURTIS, Ch. J., and SPEIR, J.

*Decided January 2, 1877.*

Appeal by the plaintiff from the judgment entered upon the verdict, and from the order denying a new trial on the judge's minutes.

The action was brought by the plaintiffs, to recover the value of a package entrusted to the defendant's care for transportation to Memphis, Tenn.

The facts, and the history of the case, appear in 35 *N. Y. Super. Ct.* (3 *J. & S.*) 182 ; 53 *N. Y.* 652 ; 56 *Id.* 168 ; 38 *N. Y. Super. Ct.* (6 *J. & S.*) 248 ; 62 *N. Y.* 35 ; 40 *N. Y. Super. Ct.* (8 *J. & S.*) 512.

*Charles M. Da Costa*, for respondent.

*C. Bainbridge Smith*, for appellant.

BY THE COURT.—CURTIS, Ch. J.—When this case was last before the court of appeals (62 *N. Y.* 35, 46), it was held that in consequence of a concealment by the plaintiff of the true value of the goods, the defendants were relieved from liability for a loss occurring from ordinary negligence ; but the court expressly declined to hold that this exoneration extended to the defendant where his acts, or those of his servants, have amounted to misfeasance or abandonment of his character as carrier.

When the cause was next tried, in November, 1875,

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Concurring opinion of SPEIR, J.

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the court charged the jury in effect that if the loss occurred through gross negligence, or misfeasance, or by reason of abandonment, or of a conversion of the property by the defendant, that the defendant must be held liable. This was held to be error by the general term, and the judgment in plaintiff's favor upon the verdict rendered under this instruction was reversed. Each of the two learned judges who heard the appeal concurred in this result, though not for the same reasons.

The impression still exists with me, that in view of the discovery of the rifled package in the harbor after its delivery to the defendant, and the absolute silence of the defendant in respect to it, either by way of explanation or accounting for it, this instruction to the jury was right, and that there was evidence sufficient to warrant the submission of the question to the jury. This impression is strengthened by the views expressed and the adjudications referred to in the decision of *Fairfax v. New York Central & Hudson River R. R. Co.*, recently made by the court of appeals, and not yet reported.

The case now comes up on the appeal of the plaintiff from the judgment rendered on the verdict for \$50 and interest at the special term, in pursuance of the decision of the general term granting the last new trial. Guided by this decision of the general term, it would seem that this judgment should be affirmed; but as the plaintiff also moves that in case of such affirmance he may have leave to appeal to the court of appeals, there should be such leave given him, as the case appears to be one entitling him to it under the provisions of chapter 322 of *Laws of 1874*.

SPEIR, J. (concurring).—The court of appeals (62 *N. Y.* 35) held that silence alone, on the part of the shipper, as to the real value of the goods contained in the package, amounts to a fraud in law, which dis-

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Statement of the Case.

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charges the carrier from ordinary negligence. It did not hold, as I understand the opinion, that the carrier would be thus relieved from liability where his acts, or those of his servants, amount to a misfeasance or abandonment. The point was suggested, but the case did not call for a decision upon it, as there was no evidence in the record before the court of misfeasance or abandonment.

The two subsequent trials were had upon the same record which was before the court of appeals, without further or other evidence. On the first trial, the jury found a general verdict for the full value of the goods, which was set aside by the general term. On the second, the verdict was rendered in obedience to the decision of the court of appeals. There appears to be nothing left for this general term but to follow the decision of that court.

I am of the opinion, therefore, that the litigation must be deemed to be ended and finally disposed of by the court of last resort. The point seems to be doubted, and I agree with my learned associate that leave be given to the plaintiff to appeal.

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THE PEOPLE OF THE STATE OF NEW YORK,  
PLAINTIFF AND RESPONDENT, v. W. H. BULL,  
DEFENDANT AND APPELLANT.

ACTION TO RECOVER A PENALTY.

Under the general or revised statutes it is provided as follows :

“Upon every process issued for the purpose of compelling the appearance of the defendant to any action for the recovery of any penalty or forfeiture, *shall* be indorsed a general reference to the statute by which such action is given, in the following form, ‘According to the provisions of the statute regulating the

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Opinion of the Court, by CURTIS, Ch. J.

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interest on money,' or 'according to the provision of the statute concerning sheriff,' as the case may require, *or in some other general terms referring to such statute*'' (*Banks' Revised Statutes*, 4th Edition, marginal page, 784, § 7). The object of this provision was to inform the defendant of the nature of the action, when the same was commenced by the ordinary process (*capias*) of the courts of record before the adoption of the Code; but when the action was commenced by the service and filing of a declaration, which contained the information, it was held to be a compliance with the statute (*Thayer v. Lewis*, 4 *Denio*, 271).

The same principle has been applied to the present practice, and it has been held, that where the information is contained in the complaint attached to and served with the summons, that the statutory requirement is fulfilled (*Cox v. New York Central & H. R. R. Co.*, 61 *Barb.* 615).

The complaint in this action that was attached to and served with the summons, shows that the action was to recover a penalty for "the violation of the insurance acts and statutes of the State."

This is a sufficient compliance with the statute.

But under the Code there is just reason to hold that the statute is no longer in force.

Before CURTIS, Ch. J., and SPEIR, J.

*Decided January 2, 1877.*

Appeal by defendant from an order made at special term.

*H. C. Place*, for appellant.

*Henry E. Davies, Jr.*, for respondent.

BY THE COURT.—CURTIS, Ch. J. — This action is brought to recover a penalty or forfeiture.

The defendant moved to set aside the summons and dismiss the complaint, upon the ground that no statute is pleaded, and that no indorsement is made upon the summons, and that no reference to the statute under which the plaintiff claims is made, either in the summons or complaint.

The appeal is from the order denying this motion.

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Opinion of the Court, by CURTIS, Ch. J.

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Under the general or revised statutes it is provided as follows :

“ Upon every process issued for the purpose of compelling the appearance of the defendant to any action for the recovery of any penalty or forfeiture *shall* be indorsed a general reference to the statute by which such action is given, in the following form : ‘ according to the provisions of the statute regulating the interest on money ;’ or, ‘ according to the provision of the statute concerning sheriff,’ as the case may require ; *or in some other general terms referring to such statute*” (2 R. S. 481, § 7).

The object of this provision of the statute was to give information to the defendant of the nature of the action, which, previous to the adoption of the Code, did not very clearly appear by the ordinary process, *capias*, by which actions were then commenced. But even then, if the action was commenced by a declaration, and this information was contained in the body of it, there was held to be a sufficient compliance with the statute (*Thayer v. Lewis*, 4 Den. 271).

The same principle has been applied to the present practice, and it is held, that when this information is contained in the complaint attached to the summons, that the statutory requirement is fulfilled (*Cox v. N. Y. Central and H. R. R. Co.*, 61 Barb. 615).

In the present case the complaint accompanied the summons, and on its face showed, that the suit was to recover a penalty for the “ violation of the insurance acts and statutes of this State.” If the statutory requirement is still in force, this seems to be sufficient, for the defendant is not prejudiced by being kept in ignorance of the nature and cause of the proceeding against him. The statute only requires that the reference should be made in some “ general terms,” and not specifically.

But as the Code prescribes the form and requisites of

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Statement of the Case.

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the summons for the commencement of actions, and also the notices to be inserted in it, and provides that all statutory provisions inconsistent with the act are repealed, there is just reason for considering that the section requiring this indorsement upon process is no longer in force. One of the objects sought to be accomplished by the enactment of the Code, was to simplify the form of process, and to relieve it of the complications and embarrassments arising from various common law and statutory rules affecting it.

The order appealed from should be affirmed with costs and disbursements.

SPEIR, J., concurred.

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JACOB SOLOMON, PLAINTIFF AND RESPONDENT,  
v. THE METROPOLITAN INSURANCE COM-  
PANY, DEFENDANT AND APPELLANT.

INSURANCE. PRELIMINARY PROOFS OF LOSS. FAILURE  
TO BRING ACTION WITHIN THE TIME PRESCRIBED BY  
THE POLICY.

In the case at bar, the court charged the jury, that it was for them to consider whether the acts and statements of the defendant, that were proved before them, had the effect on the plaintiff's mind of preventing him from presenting further and detailed proofs of loss as required by the policy, and also from bringing the action on the policy within the time required by it, and if they found affirmatively, that the plaintiff was entitled to recover. *Held*, that there was no error in this charge.

If an insurance company holds out to parties insured, an officer or agent to represent it in respect to losses, and to speak for it at its office, in negotiations for the settlement and appraisal of losses, it cannot afterwards question his power to bind the company.

It is the right of the jury to reconcile and to decide upon con-



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Opinion of the Court, by CURTIS, Ch. J.

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flicting testimony before them, in accordance with proper rules indicated by the court.

Before CURTIS, Ch. J., and SPEIR, J.

*Decided January 2, 1877.*

Appeal by the defendants from a judgment entered upon the verdict of a jury.

*F. J. Fithian*, for appellants.

*Miles Beach*, for respondent.

BY THE COURT.—CURTIS, Ch. J.—This action is to recover for a *pro rata* of loss upon a policy of insurance. The defenses were, that plaintiff omitted to serve proofs of loss, and that he did not begin suit within twelve months next after the loss, as required by the conditions of the policy.

The fire occurred January 26, 1873. Due notice was given of the loss; the amount of which was fixed and determined by appraisers chosen by both parties, on February 1, 1873. A son of the plaintiff was arrested upon a charge of setting the premises on fire.

The plaintiff called two witnesses, who testified to a statement made by the defendant's secretary, about February after the fire, to the plaintiff, when he threatened to sue, to the effect that it was of no use to sue, as the defendants were willing to pay their *pro rata* share as soon as the boy was discharged. The boy was discharged about June 4, 1874, and this suit was commenced in July, 1874.

The secretary of the company admits knowledge of the boy's arrest, the notice and appraisal of loss, and the demand and threat to bring suit; but denies that he made the alleged statement in reply. There was other testimony on the part of the defendants, showing a conversation in June, 1874, on the subject of this

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Opinion of the Court, by CURTIS, Ch. J.

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loss, between the secretary and one of the plaintiff's witnesses, Mr. Harlem. The latter testified that he was also there at a second or third interview in June, after the boy's discharge, with one L. Morris, who asked the secretary why they did not pay, and he said he was not sure the boy was discharged, and refused to pay.

It was for the jury to pass upon this conflict of evidence, to find whether any witness testified falsely, or whether the secretary of the company might not have forgotten the first interview, happening shortly after the appraisement. The disposition of it lay within their province, and the case fails to disclose any such preponderance of evidence in the defendant's favor, as calls for granting a new trial. It was the right of the jury to seek to reconcile the testimony; and the mode in which it could be done was indicated in the judge's charge. Unless the plaintiff was induced by some act of the defendant, it is hardly probable he would have failed to present proofs of loss, and sue within the time specified in the policy.

The court also charged the jury, that if they found this promise to pay without suit on young Solomon's discharge was made, it was for them to consider whether that promise, together with the fact of the appraisement being voluntarily made by the defendant, had the effect on the plaintiff's mind of preventing his taking steps to present further and detailed proofs of loss, and whether it had the further effect of preventing the bringing of the action upon the policy; and that, if they found affirmatively, the plaintiff was entitled to recover the loss as adjusted. There was no error in this.

It is insisted that the defendants are not bound by any such statement as their secretary is claimed to have made; but if they hold him out to parties insured, to represent them in respect to losses, and speak for them at their office, in negotiations for the settle-

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Statement of the Case.

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ments and appraisements of losses, it is inconsistent with good faith towards parties who have rested relying upon his statements or promises, to raise technical objections to his authority to bind them. The company cannot justly allow one of its officers to mislead persons under such circumstances, and after inducing them to omit presenting proofs of loss or commencing suit in time, take advantage of such omission by questioning their officer's power (*Amey v. New York Union Ins. Co.*, 14 *N. Y.* 266; *Ripley v. Ætna Ins. Co.*, 30 *Id.* 164; *Dickerson v. Wason*, 47 *Id.* 439).

The evidence does not sustain the objection, that the judgment must be reversed because it affirmatively appeared that the plaintiff was not the owner of the claim when the suit was commenced.

The judgment appealed from should be affirmed with costs.

SPEIR, J., concurred.

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J. B. WILLIAM WILSON, PLAINTIFF AND RESPONDENT, v. AUGUSTA S. KNAPP, EXECUTRIX, &C., AND SHEPARD KNAPP AND EDWARD S. KNAPP, EXECUTORS, &C., DEFENDANTS AND APPELLANTS.

COLLISION OF VESSELS.

OWNERSHIP OF VESSEL, AND TITLE OF SAME.

*Relative rights of a mortgagor, the owner of the vessel as appears from her register, and his mortgagee, or the assignee of such a mortgage in possession of the vessel.*

The plaintiff, a resident of Port au Prince, Hayti, was the owner and in possession of the vessel in question prior to the execution of a mortgage upon the same in August,

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Statement of the Case.

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1870, to one Ballon, to secure the payment of three thousand pounds. Ballon, upon the same day the mortgage was made, assigned the same to Oliver Cutts & Co., of Port au Prince, Hayti, who took and held possession of the vessel under the mortgage and assignment, and at the time of the collision (in December, 1874), the vessel was in possession of parties by virtue of letters of attorney from Cutts & Co., and these parties were entitled to the profits of the vessel, but for the collision.

The vessel was registered in the name of the plaintiff, and the mortgage and assignment of the same recited the fact that the vessel was the property of the plaintiff, "as per register," and the mortgage had not been foreclosed.

*Held*, that under these circumstances, the plaintiff's title to the vessel and his rights therein were such, that he was entitled to sue for damages for an injury to the vessel, notwithstanding he was not in possession, and had not been for some years, and was not entitled to her earnings or profits at the time of the collision.

The plaintiff can tender the amount due on the mortgage and redeem his vessel; or, if she has earned enough to satisfy the mortgage, he can compel an accounting, and thus redeem her.

The improbability of redemption, and the lapse of four years without any effort for redemption, are not facts which of themselves divest the plaintiff of his legal right to redeem the vessel.

The trespasser cannot avoid his liability for the damage he inflicted upon the vessel, by setting up the rights or equities of other parties in the same, who are cognizant of the facts and have notice of the plaintiff's action, and approve and promote the same.

The referee found the expense of certain work was four hundred dollars, and that he found no evidence to enable him to specifically detail the several items of this expense, to which the defendants excepted. *Held*, that if the defendant wished the referee to find the items making up this amount, he should have in some way furnished the evidence.

It has been held that no exception lies to the refusal of a referee to find the particulars which go to make up his general conclusions of fact (*Avery v. Foley*, 4 *Hun*, 415).

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Opinion of the Court, by CURTIS, Ch. J.

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Before CURTIS, Ch. J., and SPEIR, J.

*Decided January 2, 1877.*

This is an appeal from a judgment in favor of the plaintiff for \$5,633.88, entered upon the report of Edward L. Owen, Esq., referee to hear and determine the issues.

The action was brought by the plaintiff, claiming to be the owner of the barque "Trait d'Union," to recover damages for an injury to the barque, caused by a collision with the ferry-boat *Martha*, owned by the original defendant, Gideon L. Knapp.

On the night of December 25, 1874, while the barque was lying moored on the southerly side of a wharf at Greenpoint, East River, the *Martha*, while the pilot was absent from the wheel, came in collision with her, striking her on the starboard side, forward of the main rigging, and angling towards the stern, crushing in her side, raising her deck, and also starting planks and breaking fenders on the port side.

At the trial before the referee, there was no controversy as to the fact of the collision, or the liability for the damage; but the defendants claimed, that the plaintiff was not the real party in interest, and had no right to sue; and that the damage did not exceed \$1200.

*Edmond Wetmore*, for appellant.

*William W. Goodrich*, for respondent.

BY THE COURT.—CURTIS, Ch. J.—The barque "Trait d'Union" was, previous to June, 1870, an armed vessel belonging to the Haytian government. About June, 1870, she was purchased from that government for her subsequent owners, by William H. Ballou, who has for several years past been her master.

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Opinion of the Court, by CURTIS, Ch. J.

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This witness testified, that at the time of the collision, the plaintiff was the owner of the vessel; and that he lived at Port au Prince, Hayti; that he appears on the register as owner; and that the legal title is in the plaintiff.

It was shown that on August 4, 1870, the vessel was mortgaged by the plaintiff to Ballon, to secure £3,000, and on the same day, Ballon assigned the mortgage to Oliver Cutts & Co., of Port au Prince, to secure £2,500. Both in the mortgage and assignment, it is recited, that the vessel is the property of the plaintiff, "as per register." Under these documents, the possession of the vessel passed from the plaintiff to Oliver Cutts & Co. prior to September, 1870. The latter, in September, 1870, by letters of attorney, authorized Robert Murray, Jr., of New York, to act as general agent of the vessel, and to sell and deliver her. Murray and Ballon testified, that, previous to the collision, they each acquired an interest in the profits of the vessel, amounting respectively to about one-half each. They were in actual possession of the vessel at the time of the collision, and entitled to the profits she would have earned but for the collision.

The plaintiff was the owner, and in possession of the vessel prior to the mortgage to Ballon. The execution of that mortgage, and the taking possession of the vessel under it, by the assignees of the mortgage, Oliver Cutts & Co., are the only circumstances shown, that affect the rights of the plaintiff to the vessel. There has been no foreclosure of this mortgage. The plaintiff has a right to tender the amount due upon the mortgage, and redeem his vessel, or if the vessel has earned enough to satisfy the mortgage, while in the possession of the mortgagee or his assignees, he has a right to compel them to account to him, and to redeem the vessel. It was his right to mortgage his vessel to his creditor to secure an indebtedness, and it was equally

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Opinion of the Court, by CURTIS, Ch. J.

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his right to place that vessel in his creditor's possession, until the use and profits of it should extinguish that indebtedness. All this the plaintiff could do, without parting with the whole beneficial interest in the vessel. The improbability that the mortgage would be paid, either by the plaintiff, or by the profits of the vessel, and the lapse of four years between the execution of the mortgage and the collision, without any effort to redeem or to compel an accounting by the plaintiff, are not in themselves circumstances that divest him of his legal rights to redeem this vessel.

The defendants in their points state, that the plaintiff's name was kept in the register, simply to secure the benefits of a British registry for a vessel practically belonging to other than British subjects; and that this is a common device. While such a practice may invite the attention of a political economist, or in a proper case call for the action of a court, yet the evidence in the case before us does not disclose facts sustaining the defendant's claim.

Though at the time of the collision, the profits of the vessel did not belong to the plaintiff, and he was not in possession of her, yet he had rights that entitled him to sue for damages for an injury to the vessel. If Oliver Cutts & Co., as assignees of the mortgage, or if Ballou or Murray, having interests under, or acting for them, have any equities to protect, it is apparent that they have notice of the plaintiff's suit and are promoting it, and, it is to be presumed, consider themselves duly protected. It is not for the trespasser to avoid his liability for the damage he has inflicted, by setting these up in their behalf.

The next question for consideration is whether the referee has erred in ascertaining the amount of damage to the vessel from the collision.

The referee found that the expense of repairing the damage to the vessel was \$3,877.77.

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Bucknam & Co.'s bill as shipwrights and caulkers was . . . . .	\$4,122.78
Wm. Cochran's bill as rigger was . . . . .	4.30
James Mahon's bill as plumber, was . . . . .	7.92
Robert S. Place's bill as shipsmith was . . . . .	165.37
John J. Coger, bill as shipjoiner was . . . . .	199.20
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	\$4,499.57

In addition to the above bills for repairs, there were others presented by the plaintiff, and claimed, making in all \$7,462.85.

The referee found that the vessel was not strained all over, and that the re-fastening and re-metaling her was unnecessary, and also that the recaulking her all over was unnecessary. He appears to have rejected from consideration all the bills except the five above described, amounting to \$4,499.57.

From these latter he apparently re- jected the cost of replacing timbers and planks that were decayed . . . . .	\$215.80
Also the expense of watching metal . . . . .	6.00
And also the expense of the work he considered unnecessary, for re- caulking, remetaling and refasten- ing her, . . . . .	400.00
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	\$621.90

Subtracting these deductions from the amount of the five bills, leaves the amount found for repairing the damages, \$3,877.77.

The performance of the work, and the supply of the materials, charged for in these five bills, is proved by various witnesses. They are testified to, as just and reasonable, and, with the exceptions above stated,



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are shown to be proper and necessary to make the vessel as good as she was before the collision.

In addition to the \$3,877.77 the referee finds, that the value of the use of the vessel was \$35 a day, or for the period of twenty-one days, while she was detained undergoing repairs, \$735. The evidence is sufficient to sustain him in finding a larger amount than that, and it is an item in the amount of the damages caused by the collision.

There was some conflict in the estimates by the witnesses of the amount of damage, and there was testimony tending to show that the extent of the injury was not apparent until the vessel was stripped and on the dock. No sufficient reason is shown to lead to the conclusion that the referee has in any degree over-estimated the damage.

There were some exceptions taken at the trial in regard to the admission of evidence, but none that appear material.

The referee found, under an order of the court, that the expense of caulking the bottom and furnishing materials, and stripping off and putting on metal, was \$400, and that other than this, he found no evidence enabling him to specifically detail the several items making up this amount. To this the defendant excepts. It has been held that no exception lies to the refusal of a referee to find the particulars which go to make up his general conclusions of fact (*Avery v. Foley*, 4 *Hun*, 415). If the defendant had wished the referee to find, specially, the several items making up this amount, he should have put it in the power of the referee to do so, by showing it, either upon the examination of the witness Rosevelt, who testified to estimating the number of sheets of copper originally on the vessel, and the difference between new and old as affecting the price, and also as to the other items in the rejected amount he valued, or in some other way.

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The judgment appealed from should be affirmed with costs.

SPEIR, J., concurred.

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HENRY WEIL, PLAINTIFF AND APPELLANT, v.  
FANNY FISCHER, *et al.*, DEFENDANTS AND  
RESPONDENTS.

REAL ESTATE. MORTGAGE.

RIGHTS OF ASSIGNEE.

*Representations of mortgagor to assignee immediately previous to the sale and assignment of the same—effect of.*

Where a mortgage has been executed and placed upon the market for sale, and both the mortgagors and mortgagee assured the person who proposed to purchase, and who afterwards became the purchaser and assignee of the same, when they were inquired of in relation to the mortgage, that the consideration was for money advanced by the mortgagee for building the house on the premises, and the mortgagors assured him it was made for value, and gave him a certificate, stating among other things, "that they knew of no offset or defense, legal or equitable, to said bond and mortgage," and the said assignee relied upon those statements and certificate, and purchased the bond and mortgage, the mortgagors cannot afterwards show that the bond and mortgage was without consideration and void because of usury in its inception.

It is the right of the assignee, plaintiff in such a case, to prove that he relied upon the facts stated in the said certificate, and acted upon such reliance, and bought the mortgage in good faith, in order to show that good faith and conscientious course and equity, upon which the doctrine of estoppel rests (*Wilcox v. Howell*, 44 N. Y. 402; *Eitel v. Bracken*, 38 N. Y. Superior Court Rep. 7).

The evidence shows that the mortgagors, although Germans,

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had as good or a better knowledge of the English language, than most Germans who have been for the same long period residents of this country. The one read the certificate to the other, in the presence of the plaintiff's attorney, and both said they understood it. They had the fullest opportunity to enlighten themselves as to its effect, and if they omitted so to do, under the circumstances shown, the law gives them no special immunity or privilege, to avoid an obligation thus incurred, or to accomplish a wrong, under the plea or claim of an imperfect acquaintance with the English language, and such a claim cannot be sustained.

Before CURTIS, Ch. J., and SPEIR, J.

*Decided January 2, 1877.*

Appeal from judgment.

*S. T. Freeman*, for appellant.

*M. L. Townsend*, for respondents.

BY THE COURT. — CURTIS, Ch. J.—The action is brought to foreclose a mortgage. The answer admits the making of the bond and mortgage, and sets up that they were made to Emma R. Wessa, to enable her to borrow money thereon, and without any consideration whatever, and that the plaintiff knew these facts at the time of the assignment to him.

The answer also alleges that Mrs. Wessa assigned the bond and mortgage to the plaintiff as security for a sum loaned and advanced by the plaintiff to Mrs. Wessa, and which sum was less than their face, and claims that the transaction was usurious.

There is no evidence that the plaintiff had any knowledge or notice of these facts alleged by the defendants in respect to the mortgage, at the time of the assignment to him. His attention was called to this mortgage by his attorney, to whom the broker of the

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mortgagee applied to sell the mortgage. The plaintiff took the usual steps and precautions, that any purchaser of a security of this nature takes. His attorney examined the title to the property, and made inquiries about the mortgage. The mortgagee's broker told him that the consideration for the mortgage was money advanced by the mortgagee for building the house upon the premises described in the mortgage. This statement was confirmed by Fischer and wife, the mortgagors, when the plaintiff's attorney inquired of them about it. They assured him it was made for value, and gave him a certificate stating, among other things, that they knew "of no offset or defense, legal or equitable, to said bond and mortgage." The price the plaintiff paid for the purchase of the security, which was thus put upon the market, may have been, for anything that appears in the case, greater or less than its value. But, however this may have been, the mortgagors cannot be sustained in their position that they misrepresented the matter, and, after having fraudulently and in collusion with the mortgagee induced the plaintiff to part with his money, that they are now at liberty to show that the security was without consideration, and that it is usurious, and thus defraud him.

The evidence does not sustain the claim of the mortgagors, that the mortgage was without consideration ; for one of them admits in the course of his cross-examination that the mortgagee's agent had advanced money to pay for work on the house on the mortgaged premises, and that the mortgage was given to pay for it, which statement is confirmed by the testimony of the other mortgagor, that she signed the mortgage because she supposed it would be used for the house.

The allegation of the defendants, that Mrs. Wessa assigned the security to the plaintiff to secure a loan made by him to her, fails of proof. The transaction

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between her and the plaintiff was simply a purchase, for a certain sum, of the security in question.

The claim of the mortgagors, to be exonerated from the effect of the representation that the mortgage was made for value, and from the statements in the certificate given at the same interview, in consequence of their imperfect acquaintance with the English language, is difficult to sustain. The evidence shows they had as good or a better knowledge of the English language than most Germans who have been for the same long period of years in this country. The one read the certificate to the other, in the presence of the plaintiff's attorney, and both told him that they understood it. There is no fraud or bad faith alleged against the plaintiff. They had the fullest opportunity to enlighten themselves as to its effect, and if they omitted to do so under the circumstances here shown, the law gives them no special immunity or privilege to avoid an obligation thus incurred, or to accomplish a wrong.

The plaintiff excepted to the ruling of the court, excluding the question, as to whether he purchased the mortgage relying on that certificate. The plaintiff should have been permitted to show that he bought the mortgage in good faith, relying upon the certificate (*Dinkelspiel v. Franklin*, *Supreme Ct. General Term, First Dept.*, not yet reported). It is the right of the plaintiff to show that he believed and relied on the facts stated in the certificate, and acted upon such reliance, in order to show that good faith, and conscientious course and equity, upon which the doctrine of an estoppel *in pais* rests (*Wilcox v. Howell*, 44 *N. Y.* 402; *Eitel v. Braken*, 38 *N. Y. Super. Ct.* 7). The plaintiff in this case had the same right to testify concerning these matters, as any other person called as a witness. The plaintiff, when recalled, testified without objection,

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that before he paid the money, he relied upon what was told him about the mortgage.

If these views are correct, the judgment cannot be upheld, and it should be reversed and a new trial granted with costs to abide the event.

SPEIR, J., concurred.

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JAMES LAWRENCE, AND OTHERS, PLAINTIFFS, v.  
SILAS MERRIFIELD, WILLIAM O. McDOWELL AND EDWARD L. MERRIFIELD,  
DEFENDANTS.

I. PARTNERSHIP. LIMITED UNDER THE STATUTE.

1. CASH PAYMENT BY SPECIAL PARTNER.

(a) EFFECT OF ; WHAT IT DOES NOT DEPEND ON.

1. It does not depend *on the means* used by the special partner to obtain the money, so long as the ownership of the money paid in is in the special partner.

(b) GOOD FAITH IN PAYMENT OF ; REQUIREMENT OF THE STATUTE AS TO, WHEN SATISFIED.

1. When the owner of money pays it into the common stock, under the forms of the statute, and it is thereafter left to the risk of the business, with an accompanying intent so to pay and so to leave it, and with no intent and no purpose of making such payment and devotion of the money to the business otherwise than real, actual or absolute, this requirement of the statute is satisfied.

2. APPLICATION OF THESE PRINCIPLES.

- (a) *What facts not sufficient to sustain a verdict* holding one, who has in manner as above paid in money as special partner, as a general partner, on the ground that such payment did not meet the requirement of the statute.

1. SALE BY ONE TO BECOME SPECIAL TO ONE TO BECOME A GENERAL PARTNER IN A CONTEMPLATED SPECIAL PARTNERSHIP.

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## 1. The facts

- (a) That the cash contributed by the special partner was obtained by him from the general partner on a sale to him of a stock of goods ;
- (b) That the sale was made with a view of enabling the special partner to become such ;
- (c) That the goods were worth only from fifty to seventy-five per cent. of the amount at which they were sold to the general partners ;
- (d) That it was the understanding at the time of the sale, that the stock of goods so sold, should be brought into the firm by the general partner, at the price at which it was sold to him, as his contribution to the capital of the firm, called for by the partnership articles ;—

Are not sufficient to sustain  
a verdict holding the one so paying in his cash as a  
special partner to be a general partner.

2. SEPARATE VERDICT.—See *post*.

## II. SEVERAL VERDICT AND JUDGMENT. DEFENDANTS.

## 1. GENERAL AND SPECIAL PARTNERS.

- (a) Action against a member upon notes alleged to have been made by them as copartners under a certain firm name, and for goods alleged to have been sold them as such partners under such firm name. Defense by one, that he is a special partner, which is maintained ; defense by another, averring the limited partnership, and denying that the notes were made by, or the goods delivered to, the defendants, and alleging that the notes were made by and the goods sold to one of the general partners in the name of the firm as such limited partnership, which allegations and denials are maintained ; *Held, that verdict and judgment should go in favor of the special partner, and against the others.*

Before SEDGWICK and SPEIR, JJ.

*Decided January 2, 1877.*

Verdict for plaintiff, and the exceptions ordered to be heard in the first instance at general term.

The action was on contract, against the defendants

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as partners. The defense of Edward L. Merrifield was that he was a special partner, under the statute for the formation of limited partnership. As to this defense, the defendant gave in evidence, the certificate under the statute in due form, proofs of due publication, and the affidavit of McDowell, one of the general partners, "that the sum specified in said certificate, to wit: \$5,000, to have been contributed by the special partner Edward L. Merrifield, to the common stock, has been actually and in good faith paid in cash." The plaintiffs called as their witness, McDowell, who said that before the formation of the partnership, the defendant, Edward L. Merrifield, "had been in this same business for some time alone, without any partner, and had a stock of merchandise, desks, safes and various paraphernalia for doing the business on hand. He stated to me, that it was impossible for him to contribute merchandise as a special partner, and therefore invoiced the merchandise to me, and I paid him with my money for it, and then he checked upon the same account, and I contributed the merchandise to the firm. Q. That is, he sold you the merchandise, checked against the money received for it, you contributed the merchandise, and he contributed his check in that manner? A. Yes, sir."

It also appeared that the check given by McDowell was upon his own bank account, in which he had money to an amount greater than the check, and that defendant, Edward L. Merrifield, deposited in his bank this check and then drew his own check for \$5,000, and paid it into the partnership before the advertisement. On the day of the sale of the merchandise, the partnership articles were executed, by which the special partner was to contribute \$5,000 in cash, and "the said McDowell shall contribute \$5,000 in merchandise or money, or in both." McDowell contributed under this, as his part of the capital, the merchandise sold to



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him by Edward L. Merrifield. He testified that at the time of the purchase, it was not worth \$5,000, but only from 50 to 75 per cent. of that amount. The sale had not been impeached for fraud, by McDowell.

At the close of the testimony, the defendant E. L. Merrifield's counsel asked the court to direct a verdict for him, on the ground that the testimony showed that he was not a general partner. The court refused this, but submitted to the jury the single question, whether the capital paid by Edward L. Merrifield, was in fact paid in cash, in good faith? On this point the judge charged, "If you find that the statement contained in the affidavit of McDowell, with respect to the payment in cash, of the amount of capital specified in the partnership certificate, to have been contributed to the common stock, by the special partner was untrue; that the plan adopted to effect such payment was a mere covert device, a contrivance to effect the semblance of a payment in cash by the special partner, while in reality his only contribution was a stock of goods put off upon the partnership, as the equivalent of \$5,000, though in reality not worth that sum, under and by virtue of a merely colorable sale thereof, from Merrifield to McDowell and from McDowell to the firm, then the exemption and immunity accorded by the law to special partners does not attach to Edward L. Merrifield, and the defense of a special partnership does not avail him."

The defendant, E. L. Merrifield, made due exceptions. The verdict was for the plaintiff.

The court stayed the proceedings, and directed the exceptions to be heard in the first instance at general term.

*Mathew Daly*, attorney, and *F. B. Coudert*, of counsel, for plaintiff.

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*Britton, Ely & Snell*, attorneys, and *Wm. A. Beach*, of counsel, for defendants.

BY THE COURT.—SEDGWICK, J.—Beyond controversy, the principle on which the learned judge placed his charge was sound. A special partner must contribute in actual cash payments, a specific sum, as capital, to the common stock. A general partner must make affidavit that the sum specified in the certificate to have been contributed by the special partner, has been actually and in good faith paid in cash, and if any false statement be made in the affidavit, all the persons in the partnership are liable as general partners (1 *Edmonds' R. S.* pp. 716, 717, §§ 2, 7, 8).

If the sale in this case were merely colorable, were a device and cover for the putting in of merchandise as special capital in the stead of cash, then the defendant E. L. Merrifield did not actually and in good faith pay in cash. This would not be the fact, however, if this defendant was the real owner in his own right, and not for another, of the cash that was paid in by him, for then all would be done towards the actual contribution of cash, that ever could be done. The question is, therefore, was there any testimony at all, upon which the jury could rightfully say, that the sale was a contrivance to put into the common stock, as special capital, goods in the place of cash. The plaintiff's witness, the general partner, McDowell, gave the only testimony on this point, excepting what was said in confirmation by the defendant as a witness. McDowell testified that the defendant said that the law would not permit him to use goods as special capital. Thereupon the defendant sold the goods to McDowell, and McDowell paid for them in cash. There seems to be no evidence, by which this transaction can be construed to have a character other than is given by the unambiguous meaning of the words of McDowell's testi-

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mony. As before the sale McDowell had the cash, and could have, by paying it into the partnership, become a special partner, so could Merrifield, after the sale, upon becoming possessed of McDowell's title to the money.

The learned counsel for the plaintiff urges that this simple view does not consider all the facts of the case. His general position is that there were facts on which the jury might say that the capital, although actually paid in by Merrifield, was not paid in in good faith, within the meaning of the statute. There are several suggestions as to the bad faith that might have been found by the jury. They are that the defendant wrongfully or in some way fraudulently induced McDowell to take the goods at a price greatly above their value; that the circumstances show that the real object of the parties was not a purchase and sale of merchandise; that the sale was only colorable, the real intent of the parties being to make E. L. Merrifield a special partner by his contribution of merchandise, through the hands of McDowell, while McDowell contributed his cash as general partner, through the hands of E. L. Merrifield.

It seems to me to be clear, that the purpose of the statute is satisfied to every intent, when the owner of money in fact pays it into the common stock under the forms of the statute, and it is thereafter, left to the risks of the business, with an accompanying intent on the part of the owner absolutely so to pay and so to leave the cash. The good faith required by the statute, exists when there are no intents and no purposes on the part of the special partner, of making the apparent payment and the apparent devotion of the special capital to the business any otherwise than real, actual or absolute.

No part of the statute regulates the means which may be used by the special partner to obtain the

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money which he makes capital. If they be fraudulent or unlawful, the remedy is not given by this statute, nor, while the other demands of the statute are answered, do those means injure the creditors or the other partners. The nature of the transaction between E. L. Merrifield and McDowell is immaterial to the issue of special partner or not, so long as it is a fact, that Merrifield became the owner of the money paid by McDowell. And when that fact is established, it cannot also be a fact, that the sale was colorable. It was a substantial sale, and not the appearance of a sale.

Indeed, the previous arrangement between these persons involved the object of enabling Merrifield to become a special partner in fact, and not merely in form or pretense. If it be supposed that McDowell was over-reached, the legal effect of his acts and of his not subsequently questioning the sale, was exactly the same as if the sale did not admit of being impeached.

It is certain that if the sale had not been made, defendant Merrifield could not have become a special partner by the use of his goods *in specie*, and the evidence shows that he knew it and did not attempt it. There is nothing evasive of the statute that by a transaction lawful as to third parties he became possessed of money which he could lawfully use under the statute.

There is, no doubt, a suspicion engendered (while the partnership articles called upon McDowell to pay in as his share of capital \$5,000 in merchandise or in cash, wholly or partly), from his paying in as his share the merchandise sold to him, as of the value of \$5,000, although he swears as a witness that it was worth much less. McDowell was not an adverse or unwilling witness. He did not intimate, in his testimony, that as a part of the circumstances connected with the sale, it was arranged or understood that he should pay as capital anything less than would satisfy the partnership

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articles. If this had been agreed, then it could not be maintained that McDowell did not know the value of the goods for which he paid over \$5,000. There does remain a suspicion, if the testimony is to be believed, that the understanding was that the goods were to be deemed worth \$5,000 when put in by McDowell as his capital, although they were worth much less. If it be granted that the jury so found upon sufficient evidence, still it cannot be seen that these depreciated goods were really a part of the special capital. They were McDowell's, and not Merrifield's. The special partner had no individual interest based upon them. And, in fact, the only supposable wrong that might be connected with this matter would be, that it was meant to represent, in order to get credit, that McDowell had contributed stock that was equal to \$5,000 in capital. We do not know from the testimony whether there was a misrepresentation of this kind. And it was not relevant to the question as to whether the statute had been broken ; for, as we have seen, the statute means to secure only that there shall be a special capital of cash, and leaves creditors for protection in other regards to other statutes or the unwritten law. Whatever general wrongful purpose there might be, the defendant Merrifield would only be liable, after a consummation of the wrong, in an action specifically charging it. It would not necessarily involve proof of the breach of this statute. The wrong would be consistent with, and perhaps its perpetration might involve, a scrupulous observance of the statute.

I have unnecessarily gone beyond the scope of the exception to be considered. That was to the charge of the court, that if the sale was colorable, a contrivance to effect the semblance of a payment in money, while in reality his only contribution was a stock of goods, the defendant E. L. Merrifield was a general partner. As I think the sale was actual and the title to the

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money actually passed as between the parties, the exception reserved for the decision of the general term, by the learned judge, should be sustained as to the defendant E. L. Merrifield. There is no reason for setting aside the verdict as to Silas Merrifield.

As to defendant Silas Merrifield the exceptions are overruled, and judgment ordered on the verdict, with costs. As to defendant E. L. Merrifield the exceptions are sustained, and the verdict against him set aside and new trial ordered, with costs to abide event.

SPEIR, J., concurred.

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**META VOLKMAN, AND ANOTHER, PLAINTIFFS AND  
APPELLANTS, v. HENRY FELDMANN, DE-  
FENDANT AND RESPONDENT.**

**I. EVIDENCE.**

**1. RES INTER-ALIOS ACTA—WHAT IS NOT.**

**(a) THIRD PARTY, CONVERSATIONS WITH.**

1. When one having a transaction with another *refers that other to a third party* for information or directions as to such transaction, the conversations with such third party upon the subject as to which information or directions were to obtained from him are admissible against the one so referring, and he will be bound by them in the same manner and to the same extent as if they had been had personally with him.

**(b) ACTS DONE BY A PARTY WITHOUT THE KNOWLEDGE OF ANOTHER AND ON WHICH THAT OTHER HAS NOT ACTED ; EXPLANATION OF.**

1. When proved and relied on by that other as evidence against the one doing them, may be explained.

**(a) What admissible in explanation.**

1. Proof of attendant facts and circumstances.
2. Proof of *mental operations* concurrent with the acts.

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2. MOTIVE, WANT OF.

(a) WHEN PROOF OF, ADMISSIBLE.

1. When the issue is whether in the transaction in question the defendant was acting for himself or another, and there is conflict of evidence as to what took place between him and plaintiff at its beginning, evidence on behalf of defendant that he had no motive to employ the plaintiff on his own behalf is admissible.

Before SEDGWICK and SPEIR, JJ.

*Decided January 2, 1877.*

Appeal from judgment for defendant, on report of referee.

The action was to recover money paid and laid out by plaintiffs at request of defendant, for advertisements caused to be made by plaintiffs at request of defendant.

On the trial, it was shown that the defendant requested the plaintiffs to procure certain advertisements to be made in newspapers, of sales of real estate. The main question was, whether he made the request in his own behalf and the plaintiffs proceeded thereon, or whether he made, to the knowledge of plaintiffs, the request on behalf of others, and the plaintiffs acted on the credit of others. The referee found in favor of defendant.

*Hutchins & Clinch*, attorneys, and *Edward S. Clinch*, of counsel, for appellants.

*Henry Wehle*, attorney, and of counsel, for respondent.

BY THE COURT.—SEDGWICK, J.—There are many exceptions which call for no particular attention, inasmuch as they involved, in most cases, the exercise of discretion on the part of the learned referee, and the

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proper rules of law were undoubtedly recognized, as to the form of questions, to the admission of evidence on rebuttal which was properly part of the plaintiffs' opening case, and to the order of proof.

The referee, however, refused to allow the plaintiffs to prove certain interviews between them and an auctioneer, in the absence of defendant, and the exceptions to this refusal were valid. An outline of the facts, is, there was an action of foreclosure of a mortgage of lands, and the auctioneer had charge of the sale. By the plaintiffs' testimony, the defendant said to the plaintiffs: "I have some advertisements again for you. It may be that the auctioneer has given it away;" and he further said, as to a proposed advertisement, written out by himself, that one of the plaintiffs should call on the auctioneer, "to ask for the English paper it should be inserted in;" and also, "I have again an advertisement for you, of an auction sale larger than usual for you. Can you come along? I want to introduce you to the auctioneer. If he has not given the advertisement away, I shall give it to you." It was further testified, that the defendant said to one of the plaintiffs, that she "should show that advertisement to the auctioneer, to see if he approved of it." The plaintiffs proposed, but the referee refused to allow them, to show that one of them called upon the auctioneer, and also what was then said by him.

The plaintiffs gave enough evidence to sustain a judgment, although there was much tending to a different conclusion, that the defendant employed the plaintiffs, on his own behalf, and the plaintiffs relied on his credit.

If the only reason for admitting the interview between the plaintiffs and the auctioneer was that it might then have appeared that the auctioneer did not make the employment, or that the defendant was not



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his agent, and thus it would show that defendant was acting for himself, it was not competent. But it was admissible on other grounds.

A general rule on the subject is stated in section 182 of *Greenleaf's Evidence*: "The admissions of a third party are also receivable in evidence against the party who has expressly referred another to him for information in regard to an uncertain or disputed matter. In such cases, the party is bound by the declaration of the person referred to, in the same manner and to the same extent as if they were made by himself. Thus upon a *plene administravit*, where the executors wrote to the plaintiff, that if she wished for further information in regard to the assets, she should apply to a certain merchant in the city, they were held bound by the replies of the merchant to her inquiries upon that subject. So, in assumpsit for goods sold, when the fact of the delivery of them by the carman was disputed, and the defendant said, 'If he will say that he did deliver the goods, I will pay for them,' he was held bound by the affirmative reply of the carman."

The rule thus stated, would not admit testimony of an interview with the auctioneer, in absence of the defendant, in consequence of his saying, "Can you come along. I want to introduce you to the auctioneer; if he has not given the advertisement away, I shall give it to you." In that case, the plaintiffs were not referred, for anything that might affect their rights and on which they might act, to the declaration of the auctioneer, apart from the defendant. Nor does it seem that the plaintiffs were referred to the auctioneer to ascertain if the advertisement had been given to others. But the testimony, which, as it was given, might be considered by itself, viz.: that the defendant said that one of the plaintiffs "should show that advertisement to the auctioneer to see if he approved of it,"

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did admit evidence as to the interview had with the auctioneer, in consequence of what the defendant then said. The same is true of any interview that might have been had upon the direction of the defendant to call on the auctioneer to ask for the English papers in which the advertisement should be inserted.

The rejection of the evidence of the interview as to the form of the advertisement and as to the papers that should be selected, calls for a new trial. The evidence, as it was on the trial, is almost sufficient to have justified testimony as to the general interviews between the plaintiffs and the auctioneer. This cannot be made certain, because the material facts are so broadcast over a great space of unimportant matter.

The plaintiffs should have been allowed to give testimony as to any facts, even mental operations, tending to explain why the entries in their books were against the auctioneer and not the defendant. They should not, however, be allowed to give mere reasoning in evidence.

Take all the case together, and I think there was enough ground to admit testimony as to the interview between Mr. Ackert and the lady whom he could not, on the trial, name or identify.

In the conflict as to what was in the beginning said by the defendant to the plaintiffs, it was proper to allow the defendant to show that he had no motive to employ the plaintiffs on his own behalf, that is, to show he had no interest in the sale.

I am of opinion that the judgment should be reversed, the order of reference set aside, and a new trial had with costs to appellant to abide the event.

SPEIR, J., concurred.

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BEEKMAN T. BURNHAM AND GEORGE W.  
DOUGLAS, PLAINTIFFS AND APPELLANTS, v.  
MATHEW T. BRENNAN, SHERIFF, &C., DE-  
FENDANT AND RESPONDENT.

I. SHERIFF.

1. EXECUTION.

(a) NULLA BONA, RETURN OF.

1. *Effect of.*

(a.) Action against sheriff, brought before such return, to recover goods levied on.

1. ESTOPPEL. The return will *not estop* the sheriff from claiming that the goods were the property of the execution debtor, or that he had a leviable interest therein.

1. *Principle.* The principle of an estoppel is that the party claiming it must have done, or omitted to do something, in reliance on the act or statement of the party against whom the estoppel is claimed, and in consequence of such reliance would be injured if proof that the fact was otherwise was admitted.

(b.) AMENDMENT OF RETURN.

The court out of which the execution issued, has power to amend it *nunc pro tunc* by striking out the return of *nulla bona*.

\*1. *Notice.* It is *not necessary* to give any notice of motion for leave to amend to a party claiming goods under a levy made by the sheriff prior to such return.

(c.) TENANCY IN COMMON. FRAUD IN SALE TO ONE.

Where two or more persons claim to be tenants in common of personal property by title derived from a common vendor, *the sheriff under an execution against the vendor may*, if the transfer to one of those claiming to be tenants in common is fraudulent and void, *levy on and seize the whole property* and the vendor's interest so fraudulently transferred.

1. TRESPASS OR REPLEVIN AGAINST SHERIFF IN SUCH

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CASE could not be sustained by the other parties in interest.

1. *A fortiori*, an action brought by them and the fraudulent transferee cannot be sustained.

## II. APPEAL.

### 1 EVIDENCE RECEIVED ON.

- (a.) Record evidence *received in the first instance* on appeal to avoid technical defects, provided it is such as cannot be controverted.

*E. G.*, an order amending a sheriff's return *nunc pro tunc*.

## III. FRAUDULENT CONVEYANCES.

1. Conveyances made with intent to hinder, delay and defraud creditors. Part 2, chap. 7, title 2, § 5, *R. S.*

- (a.) CHANGE OF POSSESSION; *what does not satisfy the statute.*

1. RESTAURANT. At the time of the sale of the fixtures of a restaurant, and assignment of the lease of the building in which it was situated, to two vendees and assignees, an undivided half to each, the vendor handed the keys to one of the vendees, saying he thereby put him in possession. He then took them from that vendee and handed them to the other one with the same statement; the latter vendee then, for the time being, went behind the counter and commenced receiving checks from the customers; he took his breakfast and dinner at the restaurant, and was there during the evenings, and rainy days and Sundays; he had, however, been in the habit of going behind the counter, receiving checks, eating there, and being there evenings, rainy days, and Sundays, for a long time prior to the alleged sale. The vendor attended (except when detained by sickness) and went about the saloon as usual, and sometimes went behind the counter. A party who had been associated with the vendor, and had the principal charge of the business under him, still remained, and had full charge to run the place under the vendees, and did so in connection with the vendor. In fact, he was employed by one or both of the vendees to superintend and take charge of the business; he made all the purchases, but made those that were made on credit in the name of the vendees. There was no change in the signs. One of the transfers was made

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some time before the other ; but at that time there was not even a formal delivery.

Held,

*no actual and continued change of possession under the statute.*

2. *Symbolic and constructive delivery.*

Not sufficient to satisfy the statute.

3. *Transferror and transferee.*

Joint possession of, does not satisfy the statute.

4. *Two transferees.*

Where one to whom an undivided interest has been transferred, goes into possession thereof, and afterwards the remaining interest is transferred to another, the possession of the first transferee does not satisfy the statute requiring a change of the possession from the transferror to the second transferee of the property, the interest in which is transferred to him.

5. *Motive for leaving the property where it was at the time of sale.*

That it was so left for the benefit of the vendees, and for the purpose of retaining customers and preventing the business from being broken up, *does not dispense with the actual change required by the statute.*

6. *Party formerly conducting the business, continuing to do so substantially as before.*

Although employed by the transferee to superintend and conduct the business, his possession is not such possession of the transferees as the statute requires.

(a.) *The statute means to discountenance this.*

(b.) GOOD FAITH ; *what does not satisfy the statute requirement as to.*

1. FULL VALUE. The sale of the property for its full value, which was paid, is not sufficient, if the motive for the sale and purchase on the part of the seller and purchaser was to hinder, delay, or defraud creditors, in the collection of their debts.

2. NOTICE TO PURCHASER. If the transferror was actuated by an intent, &c., and the transferee had notice of such intent, the statute is not satisfied, whether the transferee paid any money or not.

3. INQUIRY, REFRAINING FROM WHEN PUT ON GUARD.

1. If the transferee has before him facts which would put a person of ordinary intelligence and prudence on

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his guard, or create a suspicion, which, being followed up, would lead him to find out that there was a fraudulent intent on the part of the transferrer, his abstaining from making such inquiry *is a want of good faith.*

(c.) HINDER AND DELAY.

1. *Meaning of terms in the statute.*

Putting an obstacle in the path, or interposing some time, unjustifiably, before the creditor can realize what is owed out of his debtor's property.

IV. EVIDENCE.

1. WITNESS, NON-PRODUCTION OF. DOCUMENTS, DESTRUCTION OF.

If a party who has it in his power to call a witness who is friendly to him, and is in a position to give material evidence, omits to do so, or if he destroys papers bearing on the issue, *such omission or destruction must tell against the party so omitting or destroying, unless the omission or destruction is satisfactorily accounted for.*

2. ADMISSIONS BY AN OWNER OF PERSONAL PROPERTY MADE AFTER HE HAD PARTED WITH THE TITLE.

(a.) *When admissible.*

1. When there is *prima facie evidence* that the transfer from the party who made the admission, to the party against whom it is offered, *was fraudulent* as to the party who offers it.

V. TENANTS IN COMMON OF PERSONAL PROPERTY.

1. Seizure under execution against the party from whom one of them derived title.

1. Right of action, &c. *See supra, Sheriff.*

Before CURTIS, Ch. J., and SPEIR, J.

*Decided January 2, 1877.*

The action is for the taking and detention of personal property. The answer contains a general denial, and sets up that the property in question belongs to one William H. Lane, and that it was taken under an execution against him in favor of one James C. Greggs.

The plaintiffs obtained possession of the property under the claim and delivery proceedings. The goods

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in question were the fixtures of a restaurant, at the corner of Hall place and Seventh street, in the city of New York.

The defendant in execution, William H. Lane, had been engaged in the business of keeping a restaurant for years. His son, Albert S. Lane, had been associated with him in the business many years, and was a member of the firm at the time of the alleged purchase by the plaintiffs. The plaintiff, Beekman T. Burnham, a real estate broker, and son-in-law of William H. Lane, claimed under a bill of sale executed by the latter, of one-half the property, and delivered January 15, 1873. The plaintiff, George W. Douglas, claimed under a bill of sale from William H. Lane, January 10, 1873. Douglas was connected with the Department of Public Works.

The premises were leased by Albert S. and William H. Lane from Jesse Brown, at the rent of \$4,500 per year. The restaurant occupied the corner room, the ladies' room and the cellar. A barber's shop was on the first floor, and the city rented the remainder at the rate of \$5,000 per year. The bills of sale purported to convey the good will, and all the personal property connected with the restaurant, together with the lease of the city. The consideration named in the bill of sale to Douglas is \$2,500, and it conveys a half interest. Douglass at the time handed over \$500 and signed a paper guaranteeing the payment of two notes of \$1,000 each, given by Albert S. Lane to William H. Lane. No delivery of property appears to have taken place at this time.

The consideration named in the bill of sale to Burnham was \$4,000 for the remaining one-half interest, being \$1,500 more than Douglas had given five days before. Burnham assumed in writing the payment of a mortgage given by Mrs. William H. Lane for \$1,500 on some real estate in Westchester county, delivered

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up some notes of William H. Lane's, released a loan of \$74.38, and gave a check for \$50.46. Both bills of sale were executed on the premises.

The delivery of the property was made by the attorney who transacted the business between the parties, who, having obtained the keys, handed them to Mr. Burnham, saying he *thereby* put him in possession of the restaurant, and then took them from his hands, and put them into the hands of Mr. Douglas, saying the same thing.

Other facts in relation to the change of possession and good faith of the parties appear in the charge and opinion.

On the trial, evidence was received, under plaintiffs' objections and exceptions, of admissions and statements made by William H. Lane a long time after his alleged sale to plaintiffs.

There was evidence that William H. Lane, who was not called as a witness, was sick; but it also appeared that plaintiffs had made no effort to procure his testimony.

It also appeared that pending this action the attorney for the plaintiffs destroyed a guaranty given by Douglas, at the time of the transfer to him, to Lane to pay the notes of Albert S. Lane, and also an agreement made by Burnham, at the time of the transfer to him, to pay the mortgage of Mrs. Lane; and evidence was given concerning such destruction.

It also appeared that, after issue joined in the action, the sheriff returned the execution, under which he had levied on and taken the goods in question, *nulla bona*.

After the evidence had closed on both sides, plaintiffs' counsel claimed that inasmuch as it appeared that the sheriff had returned the execution wholly unsatisfied, and as the return, in its legal effect, released the levy and disabled the sheriff from claiming a return to him of the property, and as he could not sell it if re-



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turned, and had no writ in his hands, and therefore was not entitled to the return, the plaintiffs were entitled to a direction from the court that the jury find a verdict for the plaintiffs; and moved for such direction. Motion denied. Plaintiffs excepted.

The court thereupon charged the jury :

“*Gentlemen* :—In this case the plaintiffs are Beekman T. Burnham and George W. Douglas. The defendant is Sheriff Brennan. On April 15, 1873, the sheriff levied upon the goods that have been in dispute before you. He levied by virtue of a writ he had in his possession—a writ of execution upon a judgment in favor of Mr. Greggs, who has been a witness against William H. Lane. He had no right to take these goods, unless they were the property of Mr. Lane. The plaintiffs here, Messrs. Burnham and Douglas, say that they were the owners of the goods, and not Mr. Lane, and on these issues they are bound to establish that before you. Their position is that each was the owner of one undivided half of the goods at the time this levy was made, and each had an interest of one half in the furniture of the restaurant and the other property.

“If Mr. Douglas was the owner of one half, still the sheriff would have had a right to seize under the execution, provided Mr. Lane was the owner of the other half. The same is true of Mr. Burnham. If Mr. Burnham was in fact the owner of one half, and Mr. Lane remained the owner of the other half,—that is, if the transfer to Mr. Douglas was not good,—the sheriff still had a right to take the goods under his process, and sell out the interest of Mr. Lane.

“The practical bearing of that is this : you must be satisfied that both transfers of the one half of this property to each of the plaintiffs was good, or else the defendant must have a verdict.”

[Plaintiffs' counsel excepted.]

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“In every sale of this kind, there are three parties under the statute,—the buyer, the seller, and the creditors of the seller, if there are any such. In this case, there were creditors. Now, the law says (as morals would say), there being three parties interested, under these circumstances the seller and the buyer must pay due attention to the rights of creditors; and the law imposes very reasonable duties in that respect on the purchaser. It says, in substance, that if a man buys a thing, he can take it into his possession and appear to the world to be the owner of it, or not, as he chooses. If he does take possession of it, and becomes the ostensible owner, so that the world can see it, the creditors of the former owner can see it, and those asked to give credit to the owner can see it. There can be no injustice done, for the whole world is notified that the property has changed hands. On the other hand, if the buyer of the property does not choose to do that simple thing, and give notice to the world that there has been a sale, so that by no possibility can any one be injured or misled, then the law puts upon him the burden (or rather, under the circumstances, he takes it upon himself), that when there is a legal contest about the affair, the buyer must prove to the jury, by evidence satisfactory to them, that his purchase was in good faith and for a good consideration.

As the learned counsel for the defendant stated to you, the ordinary provision of law is that there is no presumption of wrong-doing or fraud; but in this case, from the peculiar provision of the statute, that general rule finds an exception in this class of cases, and if the buyer of property does not choose to change the ownership of property visibly, and continue that change, then he takes upon himself the responsibility of satisfying the jury that there was not any fraud; that it was in good faith.”

[Plaintiffs' counsel excepted.]

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“I may have occasion hereafter to explain that word ‘fraud.’ It does not mean anything criminal, but doing what the law considers injustice to the creditors. Therefore you must take this case up and ask yourselves whether the evidence in the case, as given by the plaintiffs or the defendants (it makes no difference where the evidence comes from) satisfies you that that sale was made in good faith, and without any intent to hinder, delay, or defraud Mr. Greggs, or the other creditors of Mr. Lane. My mention of Mr. Greggs leads me to impress upon your mind this, that there may be an intent which the law holds will avoid the sale, although the purchaser does not know the name of the creditor. The names of the creditors may be unknown, so far as the buyer is concerned, and yet he may have an intent to defraud creditors in general. The knowledge of the name is a matter of slight importance, provided the thing is intended. Therefore, gentlemen, it is your duty to take up this case as the evidence shows it, and examine it in the light of your knowledge of human affairs.

“Every part of the history of this case is valuable, and has significance from the first to the last. It either indicates that this transaction was in accordance with the ordinary transactions in which men take property, or the contrary; and it is for you to say whether it was or not. In estimating these matters, the first thing for you to consider is the relations of the parties as the evidence discloses them. On what terms were Mr. Lane, and Mr. Douglas, and Mr. Burnham? How much did they know of each other, or how little, as given in evidence in this case? Were the matters that preceded the sale such as indicate to you (because the burden of proof is on the plaintiffs) that Messrs. Burnham and Douglas approached these matters as buyers ordinarily do? If you are satisfied they have, from the evidence, one point is made by them. Proceed, gentlemen, and

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look at the consideration. So far as the question of valuable consideration goes, the consideration in both cases was valuable enough to sustain these conveyances, if there was good faith, which they are bound to show to you. Therefore look at the character of the conveyance in the light of the question, was there good faith?

“Now, that leads me to say to you, that the consideration may be perfectly good, and may be perfectly adequate; that is, may be equal to the value of the property; but it does not follow necessarily from that that the transaction was not to defraud creditors, as you can see for yourselves as business men. If you knew your debtor had a house, some real estate, and you knew where to fix it, to see what changes went on in respect of it, you would consider that as giving him a great deal more credit than if he had so much money as that house was worth in his pocket; because you could not find out, you would not know what had become of it; and therefore, in such a case as that, you being a creditor, if a man your debtor sold the house and got the money, full value for it, and then went off, you would find you were severely injured, although, in fact, the man had got all the property was worth. Therefore, you see the importance of examining closely this consideration that was passed.

“I do not go over the facts of the case. Both counsel have stated them correctly; and no doubt, you remember them.

“Then, gentlemen, the next and perhaps as important a thing as any in examining this question of good faith, is this: On the theory of the plaintiffs, these parties, Messrs. Douglas and Burnham, became the owners of this restaurant, a business of its own, and according to their position before you, which they are bound to maintain, they took charge of it as owners, with the motives that ordinarily influence owners;

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that is, that they should not lose money, but should make it; especially that they should not lose the money that they put into the business. Now, you remember exactly what has been testified to you: the burden of proof being on the plaintiffs, what they did, how the keys were passed over, how Mr. Douglas went behind the counter on the next night and took money, how thereafter from night to night he did the same thing, and calling in there for his meals, &c. You recollect how Mr. Burnham testified he went there after that. You must take these circumstances into consideration, with the testimony given by them with respect to what their habits in respect to going there previously were; and, having these facts in the case, say are you satisfied from them that these gentlemen acted as owners of this property? You will inquire what do owners generally do, what examinations do they make, how do they insure that expenses shall not be too great, that income shall be turned over properly. Experience tells you what people do in respect of property that they become owners of; and it is for you to say, in the light of what has been given in evidence, whether the plaintiffs did in good faith take possession of the property as owners, and meant to become owners.

“Then you proceed in the case down to December, 1873. During that time there is some evidence as to who was there. William H. Lane and Albert Lane, besides the plaintiffs. The sheriff testifies that William H. Lane was there, with his hands in his pockets. I don't think that is a fact of much importance, except as you connect it with other facts in the case, which you must find according to the evidence. About December, 1873, William H. Lane proposed to sell the property to Mr. Pierson. Gentlemen, you will take that testimony exactly for what it is worth. Let me caution you against giving too much weight to it; because if the other parts of the case show you that

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William H. Lane was not the owner, but the plaintiffs were, his declaration did not amount to much. But, on the contrary, if you are convinced the transfer was not made in good faith, then you do not need the assistance of that declaration; it makes no difference whether Mr. Lane said so or not; but still you are bound, as one fact in the case, to consider it and give it its due weight.

“Then, about a year after January 15, when the second transfer was made, about January, 1874, Mr. Lord, acting as attorney for Lane, but also being at that time the attorney for these plaintiffs (because the suit had been then commenced and was in progress some months), destroyed an important part of the evidence as to the consideration of this transfer. You must consider that fact as of great importance in this case. You must weigh Mr. Lord’s testimony, and if you are satisfied that the destruction of these instruments was accidental, or rather thoughtless, that he did not have in his mind then what their bearings on the issues of this case were, or that the rights of Messrs. Burnham and Douglas were to be thus preserved, but was an impulsive act under Mr. Lane’s directions to destroy them and destroy the notes, you will consider it of less importance, and then you will only regret that you did not have the papers before you. But if from the evidence you are obliged to say that the destruction of these papers, under the circumstances, at that time, had any relation to the matter of this transfer, were destroyed with the idea of having anything to do with it, then it is a very important fact against the plaintiffs, and you must so consider it.”

[Plaintiffs’ counsel excepted.]

Plaintiffs’ counsel thereupon requested the court to charge :

“*First.*—That where the articles sold are of such a nature that a manual delivery cannot be made, a con-

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structive or symbolical delivery is sufficient to satisfy the requirement of the statute of frauds, and in such a case the sale is valid, if it is made in good faith and for a fair and reasonable price.”

BY THE COURT.—That I refuse to charge.

Plaintiffs excepted.

“*Second.*—That between the 10th and 15th of January, 1873, William H. Lane and the plaintiff Douglas, were tenants in common, and the possession of Lane was in judgment of law the possession of Douglas.”

BY THE COURT.—I cannot charge you that, gentlemen, because it is a question of fact for you to say whether that transfer to Douglas was good. If it was, then William H. Lane and George W. Douglas would have been tenants in common, and the possession of Lane would be, in judgment of law, the possession of Douglas. But then it would not be such a possession as would prevent the burden of proof being on them to show the transaction was a fair one.

Plaintiffs excepted.

“*Third.*—That after the 15th of January, 1873, the plaintiffs, Burnham and Douglas, were tenants in common, and if the latter was in possession, his possession was, in judgment of law, the possession of both.”

BY THE COURT.—I cannot charge you that, although the principle is correct ; for it is a question of fact for you whether Burnham did go into possession after the 15th of January. If he did go into possession, and this sale was a good one, and Douglas’s sale was a good one, then they were tenants in common ; and if Douglas was in possession, his possession, in judgment of law, was the possession of both.

Plaintiffs excepted.

“*Fourth.* — That the sale in question would be valid, if made in good faith and for a fair price, without an actual or continued change of possession, if the



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property sold was left in the restaurant for the benefit of the vendees, and for the purpose of retaining the customers and preventing the business from being broken up."

BY THE COURT.—That might be a reason satisfactory to them in a business point of view, but it would not satisfy the law. They had no right, for the sake of making a transfer between themselves, to do injustice to third parties. They must make an actual and open change of possession, or else take the responsibility of showing to you that the transfer was a fair one.

Plaintiffs excepted.

"*Fifth.*—That the return of the execution by the sheriff unsatisfied, after the levy had been made and after the property had been replevied, was an abandonment of the levy, and that the defendant is not entitled to a judgment for a return of the property."

BY THE COURT.—That I refuse.

Plaintiffs excepted.

"*Sixth.*—That if Burnham and Douglas, or either of them, employed Albert S. Lane to superintend the restaurant for them, the possession of Albert S. Lane was their possession."

BY THE COURT.—No ; that is just the thing that the law means to discountenance. That is done under a bushel, so far as the creditors are concerned. You must take all the facts in the case. Now, gentlemen, such a declaration as Mr. Douglas made to Albert S. Lane, to go on and run the place, does not constitute that open change of possession which the law means under the circumstances of this case.

Plaintiffs excepted.

The defendant's counsel requested the court to charge, among other things :

"*First.*—The law declares every sale or transfer of property by a debtor to be fraudulent and void as against the creditors of the party making such sale,



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Statement of the Case.

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where it is made with the intent to hinder, delay, or defraud the creditors of the party making the sale.”

BY THE COURT.—You can see the force of all these words. That is the law. To hinder and delay is to do something which is an attempt to defraud, rather than a successful fraud ; to put some obstacle in the path, or interpose some time, unjustifiably, before the creditor can realize what is owed out of his debtor’s property.

Plaintiffs excepted.

“*Second.*—The burden rests upon the plaintiffs to prove that the sale or transfer was made in good faith, and without any intent to defraud such creditors, and if he has failed in that proof he cannot recover.”

THE COURT so charged.

Plaintiffs excepted.

“*Third.*—If the jury shall find that the goods were sold for their full value, yet if the motive for the sale and purchase on the part of the seller and purchaser was to hinder, delay, or defraud the creditors of Lane in the collection of their debts, then the transaction was void as against the creditors of Lane, and the verdict must be for the defendant.”

BY THE COURT.—I charge you that, gentlemen, as I have before.

Plaintiffs excepted.

“*Fourth.*—If this alleged sale was made by Lane with the intent to hinder, delay, or defraud his creditors, and the plaintiffs had notice of such intent, then the verdict must be for the defendant, whether the plaintiffs paid any money or not.”

BY THE COURT.—If Mr. Lane meant to defraud his creditors, and the plaintiffs had notice of that, no matter how much was paid, the transaction is void.

Plaintiffs excepted.

“*Fifth.*—To refrain from inquiry when the circumstances are such as would put a man of ordinary

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prudence on inquiry, is in judgment of law a want of good faith.

“*Sixth.*—If the circumstances attending this alleged sale by Lane to the plaintiffs were such as would have led a man of ordinary prudence to make inquiry, and such inquiry would have shown reasonable ground for believing that the sale was being made for the purpose of hindering, delaying, or defrauding creditors of Lane, then the transaction was fraudulent in law, and the plaintiffs cannot recover.”

BY THE COURT.—That is the law, gentlemen, and it follows from what I first said that when a transfer of this kind of property is made the buyer owes some duties to third parties, to creditors; and then if he has before him facts which would put a person of ordinary intelligence and prudence on his guard, or create a suspicion which, being followed up, would lead an ordinary man to find out there was a fraudulent intent upon the part of the seller, and such a purchaser abstained from making such an inquiry, in the face of the existence of such facts, that is a want of good faith; and you must say whether in this case there were facts that would put the plaintiffs on inquiry, and if there were, and they did not make that examination which men of ordinary prudence should make, that is for you to find.

Plaintiffs excepted.

“*Seventh.*—A joint possession by buyer and seller after the sale will not amount to an actual change of possession within the meaning of the statute.

“*Eighth.*—If the jury should find this property after the alleged sale remained in the joint possession of Lane and the plaintiffs, then such sale was presumptively fraudulent, and plaintiffs cannot recover, unless the good faith of the parties be proved by the evidence.”

BY THE COURT.—That is so. There must be an

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actual change of possession from Lane to the plaintiffs.

Plaintiffs excepted.

“*Ninth.*—If a party has it in his power to produce witnesses upon material points, who are admittedly friendly to him, and does not do so, and their non-production is not explained; and if papers which are material evidence in an action have been destroyed by parties thereto or their agent while it is pending, the jury should take such facts into consideration in forming their judgment upon the issues.”

BY THE COURT.—That is, no doubt, the law, gentlemen. If you believe that there has been any omission to call witnesses on either side, who might have been called and in the power of the party to call, and who, if called, would have aided you in determining this case one way or the other, then you must consider that fact as telling against the party who omitted to call them.

Plaintiff excepted.

“*Tenth.*—Then, in such a case, the presumption of law is that the facts which could be proved by such witnesses, or such papers, are unfavorable to the party so failing to produce such witness, or destroys such papers.”

BY THE COURT.—I do not charge you that in these words. I do not think there is any presumption of law of that kind. But it is a fact which you must consider, to say why they were not called, and if you consider they were not called because their evidence would tell against them, that is a fact you must consider with all the other facts in the case, to determine the question of fraud.

Plaintiffs excepted.

The jury rendered a verdict for the defendant, and assessed the value of the property at \$810, and that

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Appellants' points.

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defendant have possession thereof, and assessed the damages for the detention at \$137.07.

Judgment was entered accordingly, and plaintiffs appealed to the general term.

*George W. Lord*, attorney, and of counsel, and *Nelson Smith*, of counsel, for appellants, among other things, urged:—I. Whether there was an actual and continued change of possession within the meaning of the statute, was a question of fact for the jury; yet the judge instructed the jury, as a matter of law, that there was no such change.

II. The clear and uncontroverted evidence established such actual and continued change of possession. (a.) On January 15, 1873, the plaintiffs, under their bill of sale, were the owners of the lease of the entire building, and had it in their possession. They were tenants of the entire building in which the goods and chattels were. (b.) Each of the plaintiffs had in his actual possession a bill of sale of the undivided half of the goods and chattels in the restaurant. (c.) Immediately after the delivery of the bills of sale, all the keys of the building were delivered to them. This was the only remaining act necessary to put them in full, entire, complete and actual possession (*Gray v. Davis*, 10 *N. Y.* 285).

III. The court erred in refusing to charge that if Burnham or Douglas employed Albert S. Lane to superintend the restaurant for them that his possession was their possession. The court charged, in express and unequivocal language, directly to the contrary.

IV. The court erred in permitting the witness, Edward Pierson, to testify to the declarations of W. H. Lane, made in December, 1873, nearly a year after the sale (*Tilson v. Terwillager*, 56 *N. Y.* 277; *Sprague v. Kneeland*, 12 *Wend.* 161). The case of *Adams v. Da-*

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Appellants' points.

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vidson, 10 *N. Y.* 309, is directly opposed to Cuyler v. McCarthy, 40 *Id.* 221, 235.

V. The court expressly charged the jury that they must take his (W. A. Lane's) declarations as one of the facts in the case (Porter v. Dalley, 5 *N. Y. Leg. Obs.* 335; Salmon v. Owen, 5 *Duer*, 511; Knight v. Forward, 63 *Barb.* 311; Peck v. Crouse, 46 *Id.* 151; Loremore v. Campbell, 60 *Id.* 62).

VI. The court also erred in charging the jury that if Mr. Douglas was the owner of one-half and W. H. Lane was the owner of the other half, that then the sheriff had a right to seize the property in the manner he did, and that the jury must be satisfied that both transfers (viz., the transfer to Douglas and the one to Burnham) were good, or the defendant would be entitled to a verdict. A sheriff cannot seize and take into his possession the entire property on an execution against one joint-owner (Phillips v. Crook, 24 *Wend.* 389; Waddell v. Crook, 2 *Hill*, 471; Walsh v. Adams, 5 *Denio*, 125; and these cases are all cited and approved in Hall v. Carnley, 1 *Kernan*, 508). The Code, § 274, has made provision for just such a case. It provides that "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants." Under this provision, if the transfer to Douglas was good he might have judgment against the defendant for the value of one-half, and the defendant, having demanded affirmative relief, might have judgment against either one of the plaintiffs for one-half the value, and so *vice versa*.

VII. The defendant having returned the execution to the sheriff's office, "no property, real or personal," on March 3, 1874, he thereby waived his levy, and he was no longer entitled to judgment for a return of the property. The execution was dead the instant it was returned *nulla bona*, and the sheriff could not sell the property under it, and therefore he was not entitled to

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a judgment for its return (*Comstock v. Stowell*, 2 *How.* 53). Mr. Justice BRONSON said, in a case where the execution was returned *nulla bona*, "The sheriff no longer has any right to a return of the property, and consequently he has no right to a judgment for its value." The return of *nulla bona* is conclusive on the sheriff (*Sheldon v. Payne*, 3 *Seld.* 457; *Townsend v. Olin*, 5 *Wend.* 207; *Pennington v. Loring*, 8 *Johns.* 20; *Slergerland v. Swart*, 13 *Id.* 255; *Vail v. Lewis*, 4 *Id.* 449; *Carpenter v. Stilwell*, 1 *Kernan*, 61). Mr. Gwynne, in his work on sheriffs, says: "After the return of an execution to the clerk's office the writ is *functus officio*; the sheriff cannot re-take it or act under it" (page 424). He adds, that a return of no property cannot be impeached (see page 474, and authorities there cited). The return is conclusive on the sheriff (*Gwynne on S.* 473; *Devoe v. Elliott*, 2 *Caines*, 243; *Vail v. Lewis*, 4 *Johns.* 450; *Phillips v. Dana*, 3 *Scan.* 557). It may be said that the court had the power to allow the return to be amended; but clearly no amendment that was allowed without notice to the plaintiffs could affect their rights. On March 3, when the execution was returned *nulla bona*, the plaintiffs were entitled to judgment. How could that right be taken away by an *ex parte* order made long after the suit had been tried? The return cannot be amended, even by order of the court, so as to affect rights of persons not parties to the original suit which accrued before amendment (*Emmerson v. Upon*, 9 *Pick.* 167; *Furnant v. Paul*, 3 *Greenl.* 260; *Putman v. Hall*, 3 *Pick.* 445; *Maur v. Osgood*, 7 *Greenl.* 146).

VIII. The court also erred in charging the jury, that the destruction by Mr. Lord, the attorney of the plaintiffs, of the guaranty given by Douglas to Lane, to pay the notes of Albert S. Lane, and of the agreement given by Burnham to pay the mortgage of Mr. Lane, was a fact "of great importance in the case,"

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and that if the destruction of those papers had any relation to the matter of the transfer, it was a "very important" fact against the plaintiffs. (a.) The evidence clearly showed that the destruction of the papers was a thoughtless act, done in a moment, without reflecting that there was an action pending; done under Mr. Lane's declarations, that the notes and mortgage guaranteed had been paid by plaintiffs. If such was the case, then the fact was of no importance whatever. (b.) But even if the destruction was willful, and intentional, it was not an important fact against the plaintiffs, because it was done without the direction, assent or knowledge of the plaintiffs. A principal is never chargeable with the consequences of a willful act of an agent even within the scope of his authority; much less is he so chargeable for an act beyond the scope of his authority. (c.) The papers in question were not in the custody of Mr. Lord, as the agent or attorney of the plaintiffs. They were papers given to Mr. Lane, for his benefit, and were delivered by him to Mr. Lord, to be kept for him.

IX. The court also erred in charging the jury that if the circumstances attending the sale were such as would have led a man of ordinary prudence to make inquiry, and such inquiry would have shown a reasonable ground for believing that the sale was being made for the purpose of hindering, delaying, or defrauding creditors, "then the transaction was fraudulent in law." But the court went even further, in charging the proposition of defendant's counsel, that "to refrain from inquiry, when the circumstances are such as would put a man of ordinary prudence on inquiry, 'is, in judgment of law, want of good faith.' " The omission to make inquiry might be a circumstance to be taken into consideration by the jury; but to say that such omission made the sale fraudulent in law was going beyond all precedent or authority.

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Respondent's points.

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X. The court also erred in charging the jury as to the non-production of witnesses. It was an undisputed fact in the case, that Mr. Lane was sick, and unable to attend the trial; yet the court, at the request of the defendant's counsel, made use of language which was calculated to leave on the minds of the jury the impression that the failure of the plaintiff to produce Mr. Lane upon the stand was, under any circumstances, a fact against them from which they might infer fraud. But fraud must be proved; it cannot be inferred from facts which merely raise a suspicion (*Jagger v. Kelley*, 52 *N. Y.* 274; *Dudley v. Danforth*, 61 *Id.* 621).

XI. The plaintiffs had a right to leave the chattels in the restaurant for their own benefit, and to prevent the business from being broken up, without an actual or continued change of possession, provided the sale was in good faith and for a fair price, and yet the court refused so to charge (*Bissell v. Hopkins*, 3 *Cow.* 166; *Clute v. Finch*, 25 *Barb.* 428; *Woodworth v. Wood*, 21 *Id.* 343; *Guffin v. Cramton*, 10 *Bosw.*).

*Vanderpoel, Green & Cuming*, attorneys, and *Robert S. Green*, of counsel, for respondent, among other things, urged:—I. The rulings of the learned judge on the admission of evidence were correct. The evidence as to the declarations of William H. Lane was properly admitted, and the motion to strike out was properly refused. (a.) No ground of objection was stated (*Fountain v. Pettee*, 38 *N. Y.* 184). (b.) There had been no change of possession and the declarations were admissible (*Adams v. Davidson*, 10 *N. Y.* 309; *Newlin v. Lyon*, 49 *Id.* 661; *Willies v. Farley*, 3 *Car. & P.* 395).

II. There should not be a reversal in consequence of the sheriff's return to the execution. (a.) The question of the return of the execution was a matter between the plaintiff in execution and the sheriff. It in no way



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affected the right of the plaintiffs. It had none of the elements of estoppel as regards them (*Baker v. McDuffie*, 23 *Wend.* 289). It could be no defense to the sheriff, in a suit by the plaintiff in execution. He might have been prosecuted for a false return, and a recovery had by showing that Lane had an interest in the very goods in question. (b.) The return was subsequent to the commencement of this suit. If the strict rule is applied to shut out subsequent proceedings, the same strictness limits the plaintiffs' recovery to the condition of things at the commencement of this suit.

III. There is no ground for reversal involved in the exceptions to the judge's refusal to charge the plaintiffs' requests, or to his modifications of such requests. 1. There was no error in the judge's refusal to charge the first request (*Hartford v. Archer*, 4 *Hill*, 291-297; *Stout v. Rappelhagen*, 51 *Howard*). A request to charge, to be available on an exception to a refusal to charge the same, must be presented with such precision that it is the duty of the court to charge the proposition, in the terms of the request, without qualification (*Carpenter v. Stillwell*, 11 *N. Y.* 61; *Winchester v. Hicks*, 18 *Id.* 558; *Bagley v. Smith*, 10 *Id.* 489). 2. There was no error in the judge's refusal to charge the plaintiffs' second request. The question of fact he properly left to the jury, involving as it did the disputed question of the validity of the transfer to Douglas, but instructed them as to the law upon the facts as they should find them (*Vedder v. Fellows*, 20 *N. Y.* 126). 3. The same is true with reference to the third request. 4. There was no error in the charge in respect to the fourth request. The statute, in the absence of an actual and open change of possession, required that the transfer should be shown to be a fair one. 5. There was no error in the charge that the jury must be satisfied that both transfers were good, or the

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defendant was entitled to a verdict. If the judgment debtor, at the time of the levy, was the owner of an undivided part of the property, the same was subject to levy, and the sheriff was justified in taking the whole property, and could sell the interest of the debtor therein (*Smith v. Orser*, 42 *N. Y.* 132). The sheriff stood in the place of Lane, the judgment debtor, and no action of replevin could have been maintained against him by his co-owner (*Kusarle v. Allen*, 13 *N. Y.* 173; *Foster v. Magie*, 2 *Lans.* 183; *St. John v. Standring*, 2 *Johns.* 468; *Farr v. Smith*, 9 *Wend.* 338; *Koningsberg v. Lauritz*, 1 *E. D. Smith*, 215; *Agel v. Bets*, 2 *Id.* 188). 6. There was no error in the judge's refusal to charge that, if Burnham and Douglas, or either of them, employed Albert S. Lane to superintend the restaurant for them, the possession of Albert S. Lane was their possession. The judge's charge in this regard was correct. Albert S. Lane was the son and partner of William H. Lane, the judgment debtor, and vendor. He was the Co. of Lane & Co., spoken of in Burnham's bill of sale; he was engaged at the restaurant at the time of the alleged sale, and had been previously. He was the purchasing agent. The continuing of such a person in charge was not that change of possession which is required by the statute (*Stout v. Rappelyea*, 51 *How.*; *Hollacher v. O'Brien*, 5 *Hun.* 277; *Jones v. O'Brien*, 36 *Super. Ct. Rep.* 58).

IV. There was no error in the charge as made by the court upon the several requests submitted by the defendant. (a.) As to the second request: The charge was predicated on the fact that the evidence had not shown an actual and continued change of possession, which, under the statute, rendered the sale presumptively fraudulent, and threw on the plaintiff the burden of proof to show it was in good faith and without intent to defraud creditors. There was no such change of possession as the statute required (*Randall v. Par-*

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ker, 3 *Sandf.* 69 ; Stout v. Rappelhagen, 51 *How. Pr.* — ; *Daily Register*, April 21, 1876 ; Hollacher v. O'Brien, 5 *Hun*, 277). (b.) As to the third request : This request assumes a participation in the fraudulent intent by the purchaser. The statute is operative, except in the case of a purchaser for a valuable consideration, without notice (3 *Rev. Stat.* Banks' ed. marg. p. 137, § 5). The payment of the full value does not relieve the transaction of fraud, if both parties unite in the intent to defraud (Randall v. Parker, 3 *Sandf.* 69 ; Hanford v. Archer, 4 *Hill*, 271). (c.) As to the fourth request : As before stated, the statute only saves a purchaser without notice. Payment is not enough ; there must be good faith. (d.) As to the fifth request : This is correct (Baker v. Bliss, 39 *N. Y.* 70 ; Williamson v. Brown, 15 *Id.* 362). (e.) As to the sixth request : Under such circumstances the law charges the party with constructive notice (Baker v. Bliss, 39 *N. Y.* 70 ; Williamson v. Brown, 15 *Id.* 362 ; Pringle v. Phillips, 5 *Sandf.* 157 ; Danforth v. Dart, 4 *Duer*, 101 ; Claflin v. Lenheim, 5 *Hun*, 269 ; Weiss v. Brennan, *Superior Ct., Apl. Term*, 1876). (f.) As to the seventh and eighth requests : A joint possession by vendor and vendee is not the actual change contemplated by the statute (Boyd v. Dunlap, 1 *Johns. Ch.* 478, 484 ; Jones v. O'Brien, 36 *Sup. Ct.* (4 *J. & S.*) 58 ; Randall v. Parker, 3 *Sandf.* 69). (g.) There was no error in the charge of his honor that if a party has it in his power to produce witnesses upon material points, who are admittedly friendly to him, and does not do so, and their non-production is not explained, and if papers which are material evidence in an action have been destroyed by parties thereto, or their agent, while it is pending, the jury should take such facts into consideration in forming their judgment upon the issues. Neither William H. Lane nor Albert S. Lane were produced as witnesses. William H. Lane was shown to be

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Opinion of the Court, by SPEIR, J.

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sick, and to have been so for some time, but no steps were taken to procure his testimony. The papers destroyed were the papers connected with the pretended consideration of the bills of sale, and were destroyed by the attorney of the plaintiffs while this suit was pending. The judge declined to charge that any presumption was raised, but charged that it was a circumstance to be considered by the jury. He had previously stated the rules which should govern the jury in considering the circumstances. The absence of material testimony is a suspicious circumstance, to be considered by the jury (*Brooks v. Steen*, 6 *Hun*, 516; *Gordon v. People*, 33 *N. Y.* 501; *People v. Dyle*, 21 *Id.* 578; *Wylde v. R. R. Cos.*, 53 *Id.* 156; *Bovee v. Kelly*, 7 *J. & S.* 27). So is the destruction of important documentary evidence (1 *Greenleaf Ev.* § 37; 1 *Cow. & Hill's Notes to Phillips Ev.*; 1 *Starkie Ev.* 34; *Leeds v. Cook*, 4 *Esp.* 256).

BY THE COURT.—SPEIR, J.—When the testimony was closed, plaintiffs' counsel moved the court that as it then appeared that the sheriff had returned an execution on March 3, 1873, wholly unsatisfied, on the judgment on which the sheriff made the levy, that such return released the levy and disabled the sheriff from claiming a return to him of the property; and he not being entitled to a return, the plaintiffs are entitled to a direction from the court that the jury find a verdict for the plaintiffs. The motion was denied, and the plaintiffs excepted. If the plaintiffs' motion should have been granted, it would be an end of the case. This proposition will be first examined.

This suit was commenced May 29, 1873, and the return on the execution was made nearly a year thereafter. The objection could not have availed the plaintiffs at the time of the levy or before the return and while it remained in the sheriff's hands. The return,

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Opinion of the Court, by SPEER, J.

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therefore, of the writ was a matter between the plaintiffs in the execution and the sheriff. It in no way affected the rights of the plaintiffs. It could be no defense to the sheriff in a suit by the plaintiff in execution. Here it has none of the elements of estoppel as it regards these plaintiffs. The return was subsequent to the commencement of the suit, and if the strict rule is invoked to shut out subsequent proceedings, it would seem, by parity of reasoning, that the same stringent rule would limit the plaintiffs' recovery to the condition of things at the commencement of the suit.

The return of the writ is conclusive in that suit; and generally the sheriff is concluded by his own return until amended (*Watson on Sheriff*, 72; 1 *Ld. Raym.* 184). But this rule should be confined to cases where the party against whom it is sought to be impeached *collaterally* derives some interest from or under it; otherwise there is no reason for shutting out the truth of the matter. There can be no pretense that the plaintiffs had done or omitted to do anything by reason of the return. The issue on the merits was framed long before the return, and a technical estoppel is interposed from subsequent proceedings which had no existence when that issue was joined. I am of the opinion that this is a sufficient answer to the motion, and that the return created no such estoppel.

In addition, and for greater certainty, the defendant's counsel procured and produced on this appeal the record evidence showing that the sheriff had corrected and amended his return *nunc pro tunc*. The rule seems to be well settled that record evidence may be admitted on an appeal to avoid technical defects. It is, however, subject to the qualification that the evidence shall be such as cannot be controverted. In *Bank of Charleston v. Emeric*, 2 *Sandf.* 718, OAKLEY, Ch. J., says, "It is a well settled and useful practice in res-

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Opinion of the Court, by SPENCER, J.

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pect of documents which speak for themselves, and on which no questions can arise except such as are apparent on their face, to permit them to be produced on the argument, when they have been inadvertently or unadvisedly omitted on the trial." The objection against the revival of the writ goes to the power of the court. The doctrine is too familiar for repetition that the court has the completest jurisdiction over its records. It had the power to do what was done here—to authorize the correction of the return, to give life and vigor to the process by erasing the return of "no property real or personal." The plaintiffs were not entitled to notice of the motion to correct or revive. They had no legal interest in the question. They must be looked upon in this connection as trespassers committing the wrong prior to the return of the execution. They acquired no rights founded on the faith of the return; nor, strictly speaking, did they lose any by the revival of the process (*Jarvis v. Sewall*, 40 *Barb.* 449; *Barker v. Binninger*, 14 *N. Y.* 270). This last case is in all respects an authority directly in point.

The charge of the learned judge is predicated on the fact, that the evidence had not shown an actual and continued change of possession, which, under the statute, rendered the sale presumptively fraudulent, and threw on the plaintiffs the burden of proof to show it was in good faith and without intent to defraud creditors. If there was no such change of possession as the statute required, then the presumption of fraudulent intent created by the statute must be removed by the party claiming under the sale proving that the transaction was in good faith and without any intention to defraud; and although the question of intent arising in the case is one of fact for the jury to try, yet the plaintiffs claiming under the sale must not only prove that it was in good faith but that it was without any such intent to defraud creditors. From the facts in

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the case I think the court was clearly right in its view that there was no such change of possession as the statute required. The facts in this respect, when fairly stated, are as follows :

The goods in question were in the restaurant corner of Hall place and Seventh street. William H. Lane had for years carried on the business there, and had associated with him in such business his son, Albert S. Lane. When Douglas got his bill of sale on January 10, 1873, no delivery, actual or in form, took place. Five days afterwards, when the bill of sale was made to Burnham, the attorney who drew the papers handed the keys to Burnham telling him he *thereby* put him in possession, and then went through the same formality with Douglas. Douglas went, for the time being, behind the counter, and commenced receiving checks from the customers who were eating their meals there. Burnham continued his business as a real estate broker, and was at the place once a week. Douglas was at the time connected with the Department of Public Works, engaged in his duties from 8 A. M. to 5 P. M., got his breakfast at the restaurant, and had done so for fifteen years, he took his breakfast from 6 to 7 A. M. and dinner from 6 to 7 P. M. In the evenings he attended to the business. During his absence the business was entirely attended to by William H. or Albert S. Lane or both, and William only left when he got there. Before January, 1873, Douglas had gone behind the counter and taken money for checks at the request of Lane; he would be there rainy days and all day on Sunday. After the alleged sale, William H. Lane remained there and attended except when detained by sickness; lived just across the street; when in there, he went about the saloon as usual, and sometimes went behind the counter. No change took place, so far as Albert S. Lane was concerned; he had full charge to run the place, and did so with his father, William H. Lane.



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No evidence of a change of sign, and the two Lanes were in possession when the sheriff made his levy.

This court has put a very plain construction on this statute as to change of possession: "an actual change of possession of the goods sold, in the statute of frauds, means an open, visible and public change, manifested by such outward signs, as render it evident that the possession of the owner as such has wholly ceased" (Randall v. Parker, 3 Sandf. Sup'r. Ct. 60). It is important to bear in mind this construction put upon the statute in disposing of the several refusals and requests to charge. The court decided, and rightly, I think, that the facts disclosed by the evidence threw the burden upon the plaintiffs to show *affirmatively* the entire good faith of the transaction, and an honest intent not to defraud creditors. The language of the charge is, "the burden rests upon the plaintiff to prove that the sale or transfer was made in good faith and without any intent to defraud such creditors, and if he has failed in that proof he cannot recover." The learned counsel for the plaintiffs appears to have assumed that the evidence of a change of possession was clear and uncontradicted, and that the court should have directed a verdict for the plaintiff. In support of this assumption, he refers to the fact that Douglas, immediately after the delivery of the bills of sale, went behind the counter and received the checks from the customers, and that this was an open act of possession. As to this it is only necessary to refer to the whole conduct of Douglas. While he did this only at the time being to satisfy himself of the propriety of entering upon his possession, he actually continued his own business during the whole day, taking his meals early and late at the restaurant, as he had done for several years, and coming to the restaurant on rainy days and Sundays, attending to business generally. He put Albert S. Lane as manager to attend to the business,



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which he did in the same manner and under the same circumstances under which he had performed it before the sale. This clearly was not an open, visible and public change manifested by such outward signs as render it evident that the possession of the owner had wholly ceased. It seems to me, that all the circumstances attending the sale are calculated to excite suspicion in the minds of sensible business men accustomed to the every-day fair transactions relating to the purchase and sale of property of this description. There were no schedules of the property; no outward change of sign, and nothing to notify the public that the establishment had undergone any change as to the ownership.

The objection is made and exception taken to the eleventh request to charge, that if the circumstances attending the alleged sale were such as would have put a man of ordinary prudence to make inquiries, and such inquiry would have shown reasonable ground for believing that the sale was being made for the purpose of hindering, delaying or defrauding creditors of Lane, then the transaction was fraudulent in law, and the plaintiff cannot recover. This is a case of constructive notice, which, under the circumstances the law, and not the judge, charges the party with. The rule is laid down by SELDEN, in 15 *N. Y.* (Williamson v. Brown, 362), that when a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase he is presumed to have made the inquiry, and ascertained the extent of such prior right or to have been guilty of a degree of negligence fatal to the claim to be considered a *bona fide* purchaser. This rule is affirmed in Baker v. Bliss, 39 *N. Y.* 70.

I have examined the several exceptions taken to the rulings on the admission and exclusion of testimony, and am unable to detect any serious errors in them.

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Statement of the Case.

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If the views of the court on the question of an actual and continued change of possession and intention of the parties are correct, then the several requests and refusals to charge need not be further noticed. They are all supported by qualifications, the necessary result of the views entertained by the court on the trial.

The judgment must be affirmed with costs.

CURTIS, Ch. J., concurred.

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GEORGE F. DOW, *et al.*, PLAINTIFFS AND APPELLANTS, v. JAMES DARRAGH, DEFENDANT AND RESPONDENT.\*

I. OPENING CASE AFTER PARTY HAS RESTED.

1. MOTION TO COMPEL REFEREE TO HEAR AND DETERMINE TO OPEN.

(a.) No power in the court to grant.

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\* *Note.* The action was brought for an accounting as to the business done between the plaintiff's firm of George W. Dow & Sons, and the defendant, James Darragh, under a certain contract.

The trial of the action was commenced in November, 1874, at a special term of this court, before the Hon. J. J. FREEDMAN. The main controversy upon the trial was as to the effect of the arbitration and award set up in defendant's answer. The court decided that the award was indefinite in form, but so far as it had been executed and made definite by the acts of the parties, it would be upheld. The court further decided that inasmuch as it would be difficult to determine how far it had been executed without the taking of the accounts between the parties, as to all matters and questions involved in the suit, an order of reference should be made to hear and determine the issues.

Under this decision the order of reference, in addition to referring the issues for hearing and determination, further ordered that the referee take, state and determine the accounts of and between the parties in accordance with law and equity.

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Statement of the Case.

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**II. TRIAL BEFORE REFEREE TO HEAR AND DETERMINE,  
HOW CONDUCTED ; PRACTICE.****1. OPENING CASE AFTER PARTY HAS RESTED.**

(a.) *Sound discretion.* It rests in the sound discretion of the referee.

(b.) *Review of discretion.* Cannot be had on motion to compel the referee to open.

(c.) *Discretion, when properly exercised.*

I. When the party before he rested had full opportunity to discover the facts which he subsequently proposes to prove, and the evidence thereof, and after he rested his adversary departed for his place of business and residence in a distant country; it is a proper exercise of discretion to refuse to open the case to admit proof of such facts on an allegation that they were not discovered until after the departure of the adversary.

Before CURTIS, Ch. J., and SPEIR, J.

*Decided January 2, 1877.*

Appeal from an order denying a motion made by the plaintiff compelling a referee appointed "to hear and determine" the issues in the action to re-open plaintiff's case after the plaintiff had rested, and after the defendant had returned to his place of business in India.

The motion was heard at special term, before his Honor Judge SEDGWICK, who rendered the following opinion :

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The taking of the account was therefore involved in and a part of the trial of the issues.

The question as to whether, under an order of reference to take and state accounts wholly separate and disconnected from the trial of issues, the court has not power to give directions from time to time as to the principles on which the account should be stated, or specially to direct certain matters to be inquired into and taken into account, or even to direct specified items to be charged or credited, does not appear to the reporters to have been involved in this case or passed on by the court.

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Appellant's points.

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SEDGWICK, J.—I am of opinion that the court has no power to grant this motion ; but that while the case is on trial before the referee, the relief asked is placed by the Code within the discretion of the referee, acting as the court.

This decision being placed upon a want of power, the order is appealable.

Motion denied. Ten dollars costs to defendant.

The facts sufficiently appear in the general term opinion.

*Stanley, Brown & Clark*, attorneys, and of counsel for appellants, urged :—I. The evidence which plaintiffs propose to produce before the referee is material, pertinent and competent. It is not cumulative ; and no objection could have been successfully made to it had it been produced before the referee before the plaintiffs rested their case.

II. The affidavits show conclusively that the matters proposed to be given in evidence were *newly discovered*—discovered after plaintiffs had rested their case. The positive allegations in plaintiffs' affidavit, that he as matter of fact discovered the fraudulent overcharge and omission to credit interest, after resting his case, are not denied ; nor is there any denial that the fraudulent overcharge of defendant on the co-coa-nut oil was 3,400 rupees, nor that the interest on balances in defendant's possession which ought to be allowed on the accounting is \$5,000.

III. To refuse to permit plaintiffs to give on the accounting, evidence newly discovered of positive frauds of defendant upon them by overcharges and by omission of credits due to them, amounting to thousands of dollars, is a substantial denial of justice. It is not a matter for which plaintiffs could bring a new suit. If they could, the defendant is a non-resident and out of the jurisdiction, and service could not be obtained

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Appellant's points.

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upon him. Besides, it is much more convenient to all parties concerned, that the evidence be taken on the present accounting.

IV. If the court will not grant the order applied for, then the plaintiffs are remediless; as no valid exception can be taken to the decision of the referee on appeal from the judgment (*Barb. Ch. Pr.* 631, bottom paging, note; *Fielden v. Lahens*, 6 *Abb. Pr. N. S.* 341, opinion of PARKER, J., in court of appeals; *Caldwell v. New Jersey Steamboat Co.*, 47 *N. Y.* 282, 295).

V. The court has power to order the referee to reopen the case and take the testimony. This action was brought in the superior court of the city of New York,—a court of record, having full equity jurisdiction. It is still pending in this court. The court has referred such of the issues in the cause as the court did not determine at special term, to one of its officers to hear and determine them, and has ordered that officer to *take and state the accounts* of the respective partners. But the court has not lost its power or control over the case, or in any way abdicated it. The referee is its own officer and agent, and subject to such orders as it may make in furtherance of equity and justice. It may, for good cause shown, remove a referee and appoint another, or take the case entirely into its own hands, and determine it without the aid of a referee. It has the power to remove an officer; much more has it the power to regulate the action of the referee. In what case it will exercise such power is another and a different question. This power is not so much the creature of statutes as an incident to the general and necessary powers of the court to administer justice. It should be borne in mind by the court that the suit is an equity suit, and the referee appointed to take and state the accounts has the same duties and is subject to the same control that the master was subject to in the court of chancery. Who ever heard it solemnly

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Appellant's points.

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argued that the court of chancery was inferior in any point of power to the master which that court had appointed? Yet it is argued that the referee has more power over the litigation than the court of equity which appointed him. We look in vain in the statutes for anything given by the legislature to the referee, making him, in any point, superior to the court, and the court below gave no reference to any such statutes (Ford v. Ford, 35 How. Pr. 321; Macpherson v. Ronner, 40 N. Y. Super. Ct. [8 J. & S.] 448.) The doctrine defendant's counsel contends for is highly derogatory to the court and extremely dangerous to suitors.

VI. Section 272 of the Code, headed "report to stand as decision by the court," does not take from the court any power to order further testimony to be taken in a case like the present. But the present is not the case prescribed for, because it is not sought here to review the decision of the referee upon evidence upon the trial, but is in the nature of an application for a new trial upon *newly discovered evidence* which did not appear on the trial. And it is perfectly settled that such applications may be and are constantly made and granted on affidavits of matters *dehors* the record. A motion for a new trial on newly discovered evidence must be made before judgment. Nothing whatever is gained by waiting until after the referee has reported, and then moving to set aside his report. The court can do now what it could do then; and it is much more convenient for all the parties, that the testimony be taken now, before the accounting is completed, than that the report should be set aside, and a new accounting had.

VII. Plaintiffs have been guilty of no negligence that should deprive them of their rights, in favor of one who has defrauded them in a trust-relation to them of a partner, in matters exclusively in his knowledge and under his control, which frauds were unlooked for and

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Respondent's points.

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unsuspected by them until a month before they offered to prove them.

*Blanchard & Miller*, attorneys, *E. L. Fancher*, and *Theodore F. Miller*, of counsel for respondents, urged:—I. The court has a general supervision over its referees to annul and set aside its own orders of reference, where incompetency or impropriety are alleged against the referee (*Bainbridge v. Livermore*, 56 N. Y. 75, and cases there cited). This question, however, does not arise upon this appeal. The idea of any impropriety on the part of the referee was expressly disclaimed below. But the court will not interfere with the conduct of a case pending before a referee appointed to hear and determine, or with his ruling upon matters of discretion. Such a referee is the court; he alone can pass upon questions of discretion. He must exercise a sound judicial discretion, and where he grossly abuses his power his decisions are reviewable upon appeal, just as are those of a trial court where discretion is grossly abused. “The trial by referee shall be conducted in the same manner, and on similar notice, as a trial by the court” (*Code*, § 272). “The mode of conducting its trial, therefore, must be within the discretion of the referee, so far as relates to all questions within the ordinary discretion of a judge on the trial of a cause” (*Palmer v. Palmer*, 13 How. 365; *Pratt v. Stiles*, 9 Abb. 153). The decision of the learned judge below was, therefore, correct, if the admission of the proposed new evidence was a matter of discretion with the referee.

II. It was a matter of discretion. It is purely a matter of sound discretion whether a judge or referee shall permit a party to introduce proof irregularly, or to re-open his case after resting. “If the testimony was closed the day before, it was discretionary with the court whether to open the case or not to receive the

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Opinion of the Court, by SPEIR, J.

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additional evidence, and the decision is not reviewable here. The withdrawal or absence of witnesses who might be called in reply, or other circumstances, may have rendered the decision proper" (per CHURCH, Ch. J., *Caldwell v. N. J. Steamboat Co.*, 47 *N. Y.* 295). "After plaintiff rests, it is a matter of discretion whether to allow the case to be re-opened" (Solomon *v. Central Park, N. & E. R. R. Co.*, 1 *Sweeny*, 303; *Burgen v. White*, 2 *Bosw.* 92; *Meyer v. Goedel*, 31 *How.* 457; *Ford v. Niles*, 1 *Hill*, 300). The court had, therefore, no power to interfere. It would have been very unjust to the defendant had the referee received the proposed proof of "new claims," under the circumstances. The plaintiff had a longer day in court than is usually accorded to suitors. The defendant remained to meet the case made against him, and when it was closed and he had been fully cross-examined, he returned to India to attend to his neglected business.

BY THE COURT.—SPEIR, J.—No incompetency or impropriety on the part of the referee is claimed on this appeal, nor on the motion below. It is not, therefore, a case where the court has a general supervision over its referees to annul and set aside its own orders. By section 272 of the Code, "the trial by referee shall be conducted in the same manner and on similar notice as a trial by the court." The discretion of the referee, so far as it relates to all questions within the ordinary discretion of a judge on the trial of a cause, is the same. The relief asked for comes within the discretion of the referee acting as the court, and the learned judge was clearly right in placing his decision upon the ground of a want of power.

The referee exercised a sound discretion in refusing to open the case. The defenses were put in, as it appears, directly to meet the claims presented in the plaintiffs' case after the defendant had been detained



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fifteen months on the trial and had returned to India. The plaintiff had rested, and after the defendant's departure one of the plaintiffs, it is alleged, discovered new claims from the defendant's books of account, which had been in the possession of the referee during a period of nine months, and which they had examined during that time. It is a matter of discretion whether a case shall be opened after the plaintiff rests. In this case I fail to find any excuse for this long delay, and under the circumstances it would have been unjust to the defendant; especially, as the plaintiffs had already a sufficiently long day in court. The order must be affirmed with costs, &c.

CURTIS, Ch. J., concurred.

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JAMES W. SMITH AND ANOTHER, EXECUTORS, &c.,  
PLAINTIFFS AND RESPONDENTS, v. CHARLES  
L. FROST, DEFENDANT AND APPELLANT.

I. *TRUSTEE; CONVERSION; TROVER.*

1. POSSESSION WRONGFULLY OBTAINED.

(a.) *A trustee* who, through a purchase in his own name, and for his own benefit, of property belonging to the *cestui que trust*, in relation whereof he is trustee, from one holding the same in pledge, or hypothecation, or under a mortgage or lien, in a manner in which he is authorized to sell, acquires possession thereof, *is chargeable with a conversion.*

2. DEMAND AND REFUSAL.

(a.) *ALTHOUGH HE ACQUIRES THE POSSESSION RIGHTFULLY for the purposes of the trust, yet if, when by the terms of the*

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Opinion of the Court, by SPEIR, J.

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trust, the property is deliverable to the *cestui que trust*, he on demand refuses to deliver, *he is chargeable with a conversion*.

3. FORM OF ACTION.

(a.) *Agreement*.

1. The *cestui que trust* need not base his action on the agreement which raises the trust.

(b.) *Trover*.

He may bring a common law action of trover for the conversion.

II. VALUE OF NEGOTIABLE SECURITIES.

1. EVIDENCE OF.

- (a.) The testimony of a witness as to the market value at a somewhat remote period, founded on a *general recollection*, based on his keeping the run of the market price in consequence of his being very much interested in the company which issues the securities, *is competent and sufficient prima facie*,

ALTHOUGH

he has no recollection of buying or selling, or as to any sales or purchases made, at that period.

Before CURTIS, Ch. J., and SPEIR, J.

*Decided January 2, 1877.*

*Marsh & Wallis*, attorneys, for appellant; *Mr. Sheppard*, of counsel.

*Emott, Burnett & Hammond*, attorneys, for respondent; *James Emott*, of counsel.

BY THE COURT.—SPEIR, J.—The statement of facts in this case is contained in 39 *Superior Court Reports* 389 (7 *Jones & Spencer*), and is substantially the same as appears on the argument now before us. On the former appeal a new trial was ordered upon the ground that all the evidence in the case going to show that the defendant undertook the duties of an agent, or of a trustee and to act in the matter for the interest and on behalf of the plaintiff, was admitted by the trial

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Opinion of the Court, by SPEIR, J.

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judge only so far as it would tend to show notice, and that the evidence should be strictly limited to the question of notice. The result of the error or misunderstanding, whichever it was, between counsel and the court, was to leave the real issue between the parties untried. On this trial the same evidence was in effect received without limitation as to notice, and the jury, under the direction of the learned judge, found a verdict for the plaintiff.

The main objection now made by defendant's counsel against the plaintiff's recovery is that the complaint does not state any cause of action against the defendant. The allegations in the complaint are the ownership of the property, its possession by the defendant, demand by the plaintiffs for its return, and refusal by the defendant. If the defendant, while acting as trustee, bought or undertook to buy these bonds, and to get title to them for himself, he then wrongfully converted them. The plaintiffs do not sue upon the agreement, but upon the tortious acts of the defendant after having entered into the agreement from which he cannot escape. The proof in the case showing the relation which defendant bore to the plaintiff's testator, was such that the purchase, or attempted purchase, of the bonds by defendant from any one, was necessarily a conversion, does not change the character of the action. The plaintiff's action is for a conversion of sixteen bonds of the Toledo, Peoria & Warsaw Railway Company. These were in the possession of the defendant. Assuming the possession of the defendant to these bonds was rightful, competent and material evidence could be furnished to show that the existing relations between him and the plaintiffs made defendant's detention of the bonds wrongful, and his refusal to deliver them upon demand a conversion. Whenever these vouchers—ten old bonds—were produced for cancellation not only the title of the plain-

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Opinion of the Court, by SPEIR, J.

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tiff's testator to the bonds in the action, but his right to the possession became unqualified, and after demand and refusal an action would lie against the defendant, and no averment would be necessary but ownership, demand, and refusal.

The only exception to the charge requiring our attention is that there was no legal evidence of the value of the bonds, and that the court erred in submitting Secor's valuation to the jury. The evidence offered as to valuation was that of Mr. Secor, who states that in March, 1870, the market price was from 84 to 86 cents on the dollar ; that he had no recollection of buying or selling any bonds in March, 1870, or as to any sales or purchases, made at that period ; and in answer to this question on cross-examination, "Then your estimate is more a matter of judgment than recollection, isn't it, of what you think it was at that time?" he said, "My estimate is based on keeping the run of the market price, because I was very much interested in it. Having a very large interest in the road I kept the run pretty well of the market price." It appeared that at the time of the trial (which was in April, 1876) he had been president of the company for four years ; that his brother, who preceded him, came into office in March, 1870, and it substantially appeared that he had been largely interested in the road from its organization. The court instructed the jury that as the plaintiffs had the burden of proof, they must take it as evidence, on behalf of the plaintiff, that the bonds were not worth over 84 cents on the dollar at the time claimed, unless Secor is discredited by the jury on that point. But in considering whether he is to be discredited as a witness, they must also consider that defendant, who has the means of producing evidence of what the value of the bonds was, does not in fact produce it. I cannot discover any errors in the charge to the jury, or to the remaining exceptions to the refusal to charge.

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Statement of the Case.

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The judgment and order denying the motion for a new trial must be affirmed with costs.

CURTIS, Ch. J., concurred.

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CHARLES COBB, PLAINTIFF AND RESPONDENT, v.  
SAMUEL P. KNAPP, DEFENDANT AND APPELLANT.

I. PRINCIPAL AND AGENT.

1. AGENT PERSONALLY LIABLE TO VENDOR, WHEN.

(a.) When he does not disclose the name of his principal at the time of the sale, although the vendor knows that he is acting as agent in the purchase.

1. *Disclosure of principal, what not sufficient.*

Where the goods sold are used in the manufacture of an article, and at the time of the sale there is a direction given to deliver at a certain manufactory of the article, known by a certain appellation, *e. g.*, Tower's distillery, there is not a sufficient disclosure of the principal ; it not appearing that the vendor had any knowledge as to who was carrying on the business of the factory, and no disclosure being made at the time of the names of the parties carrying on the business.

2. VENDOR, RIGHT OF ACTION IN CASE OF UNDISCLOSED PRINCIPAL.

May on discovery of the principal, *sue* either the principal or the agent, or *both*.

Before CURTIS, Ch. J., and SPEIR, J.

*Decided January 2, 1877.*

The action was brought to recover the balance of the purchase price of a cargo of wheat sold by the plaintiff in October, 1868. The defendant alleges that he

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Statement of the Case.

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was the agent of the firm of C. A. Steen & Co., and that the purchase was made for them, of which the plaintiff had notice. The plaintiff denies that he had such notice, but claims that the sale was made to the defendant, and the charge made against him on his books for the price of the wheat, and a bill of the goods sent to him for payment. It appears that after the sale the defendant became temporarily insolvent, and the plaintiff brought a suit against the firm of C. A. Steen & Co., upon learning that one Jacob Goldsmith, a man of large means, was a partner of that firm. Upon ascertaining that Goldsmith was not a partner, that suit was abandoned, and this suit was instituted against the defendant.

The defendant further claimed that on the plaintiff's own evidence there was a sufficient disclosure of the principal. The evidence he relied on was this :

“I remember the transaction with reference to this wheat ; it was on 'Change. Grain at that time was sold by presenting samples of the bulk of that which you had to sell, in small boxes, with the number of bushels to be sold named on a card, and the description. On one occasion of that kind, I was showing about 3,000 bushels of Milwaukee wheat, a portion of a boat-load, a part having already been sold. Mr. Knapp came along and priced it. I gave him the price. It did not result in a sale immediately. He went on and looked at other samples. He came back once or twice, or perhaps the third time, before the sale was completed, trying to cheapen, and finally it resulted in a purchase. Then I asked him where it was to be delivered. Some purchases are made to be delivered near the Atlantic Dock Stores, and some to be delivered at the dock of the buyer. He gave the name of Tower's distillery—a name I was perfectly familiar with. I knew where it was--on Newtown creek, East river.”

But plaintiff further testified : “ Mr. Knapp said

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Statement of the Case.

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nothing about the firm of Steen & Co. at this time. Some days after this, the bill not being paid, I saw Mr. Knapp. He said he had been disappointed in money, but he would have it in a day or two; and then, for the first time, as my recollection suggests, I asked him who he bought that stuff for, and who it went to, and I am quite clear that was the first time I ever heard C. A. Steen or any one in connection with it. I never knew any of the parties he had named. I asked, 'Who are Steen & Co.?' 'Well,' he said, 'they are a very rich distilling concern, which have bought the Tower's distillery. They have expended \$80,000 or \$90,000 fixing it up, and they own it now.' I asked who they were. He named one Steen, Donau, and Jacob Goldsmith. I asked who was Mr. Goldsmith. He said he was a partner of Mr. Bernheimer in the oil business. Said I, 'Do you know that Mr. Goldsmith is a partner in the concern?' He said emphatically, 'I know it.' Afterwards I again made inquiry who the firm was composed of. He emphatically named Goldsmith, and said, 'You know Mr. Bernheimer—he is a partner of his in the oil business, and he is worth half a million of dollars aside from that, and I know it.'

He further testified that on a previous occasion he had received instructions from Mr. Knapp in respect to dealings with him as to whom he should charge with the goods he bought; and in answer to the question, "What instructions did you receive?" he testified:

"As near as I can remember his words, it occurred like this: 'Why have you sent this bill [meaning the bill of a previous purchase] to Mr. Koehler? If you sent your bill to me you would have got your money three or four days earlier. I want, when you sell any thing to me, to have your bill come to me.' He seemed to be quite out of patience about it—came to

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Appellant's points.

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my office and gave his own check. It was a bill I had rendered to his principal instead of to him. After that, I always charged to him directly, as I did in this case, except in one case, where I knew he was acting simply as an assistant to Mr. Wallace, the principal, who was equally active himself."

At the close of the testimony on both sides, defendant's counsel moved for a dismissal of the complaint, which was denied, and he excepted. He then moved that the jury be directed to render a verdict for the defendant, which was denied, and he excepted.

The cause then went to the jury, under a charge from the judge; and the jury rendered a verdict for the plaintiff.

Defendant's counsel then moved on the judge's minutes that the verdict be set aside and a new trial granted, which was denied, and he excepted.

An order denying the motion was entered.

Thereafter judgment was entered on the verdict in favor of the plaintiff.

From this judgment, and also from the order denying the motion for a new trial, defendant appeals.

*Raymond & Coursen*, attorneys, and *William A. Coursen*, of counsel for appellant, urged, among other things:—I. The conceded facts (or such as must be conceded on the plaintiff's testimony) show that at the time of the contract of sale, the defendant did disclose the name (or to that effect) of his principal, and if the plaintiff at that time were satisfied with such disclosure, so far as it went, he could not at any subsequent time, and much less at the expiration of some five years, take exception to the want of definiteness (if it existed) respecting the individuality or names of persons, which the plaintiff must acknowledge, could and would have been made precisely clear if he (plaintiff) had expressed a wish to that effect, at the time of the



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Respondent's points.

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contract of sale, to the defendant (See *Waddell v. Mordecai*, 3 *Hill* [*South Carolina*]; also *Southwell v. Bowdich*, in the *English Court of Justice, Common Pleas Div.*, quoted in *N. Y. Weekly Dig.* of October 2, 1876, p. 187; *Rathbone v. Bedlong*, 15 *Johns.* 1).

II. The motion to dismiss the complaint should have been granted. Both principal and agent cannot be sued on a contract made by the agent, even if made in his own name, for the benefit of his principal. Thus, even if the contract in this case were with defendant as agent for C. A. Steen & Co., an undisclosed principal, which defendant denies, the plaintiff could not maintain this suit when a previous suit on the same cause of action against the principals, C. A. Steen & Co., which had been commenced over five years previous to the commencement of this, was still pending on the day of the trial herein. The party with whom the contract is made may sue the agent as principal, or if he elect he may sue the real principal, but he cannot sue both (*Story on Agency*, 7th ed. 295, last editor's note; *Priestly v. Fernie*, 3 *Hurls. & Colt.* 983; *Borell v. Newell*, 3 *Daly*, 233; *Fitzsimmons v. Baxter*, *Id.* 81).

*Lewis Johnston*, attorney, and *Albert Mathews*, of counsel, for respondent, urged:—I. The defendant, although known to be a broker, not having disclosed his principals at the time of the sale, and the credit on the sale of the goods having been given by the plaintiff exclusively to the defendant, and at the latter's special request, and he having repeatedly promised to pay the amount, there can be no doubt of the defendant's liability to pay for the goods (*Meeker v. Claghorn*, 44 *N. Y.* 349). 1. An agent purchasing goods for another is himself personally liable: (a.) Where he makes himself a party to the contract; by suffering or procuring

## Respondent's points.

the credit to be given to himself, or by promising to pay, or otherwise (*Story on Agency*, §§ 167, 169; *Pentz v. Stanton*, 10 *Wend.* 277; *Maryland Coal Co. v. Edwards*, 11 *Sup'm Ct.* [4 *Hun*] 432; *Coleman v. Bank of Elmira*, 53 *N. Y.* 393; *Hovey v. Pitcher*, 13 *Missouri*, 200). (b.) When he does not inform the vendor at time of the sale that he acts as agent, or otherwise disclose the fact of his agency, for some specific third person as his principal (*Story on Agency*, § 266; *Waring v. Mason*, 18 *Wend.* 435; *Raymond v. Eagle Mills*, 2 *Met.* 319). (c.) Where the fact of agency is known to the vendor at the time of the sale; but the name of the principal is unknown (*Story on Agency*, § 267; *Thomson v. Davenport*, 9 *Barn. & Cress.* 78; *Mills v. Hunt*, 20 *Wend.* 433; *Morrison v. Currie*, 4 *Duer*, 85). 2. If the vendor, knowing of the agency, elect at the time of the sale, to give credit to the agent, it seems he cannot afterwards charge the principal at all. The agent is always liable alone (*Patterson v. Gandasequi*, 15 *East*, 62; *Westmoreland v. Davis*, 1 *Ala.* [*N. S.*] 301). 3. In all these cases, "to whom the credit was given," is a question of fact for the jury; and their verdict, upon sufficient evidence, is conclusive (*Huntington v. Brinckerhoff*, 10 *Wend.* 278; *Meeker v. Claghorn*, 44 *N. Y.* 352; *Coleman v. Bank of Elmira*, 53 *Id.* 394; *Raymond v. Eagle Mills*, 2 *Met.* 325; *Hovey v. Pitcher*, 13 *Missouri*, 200).

II. Upon discovering, after the sale, that the vendee acted as agent for a third person, the vendor may elect to hold either the agent or such third person responsible, and this choice is not conclusive until the agent has settled with his principal or the vendor has had satisfaction (*Chitty on Contracts* [11th Am. Ed.], 308 and note; *Story on Agency*, [8th Ed.], § 295, p. 383; *Nelson v. Powell*, 3 *Dougl.* 410, and note). 1. Legal proceedings (which are not prosecuted to judgment) against the principal or agent do not discharge

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or determine the liability of either (*Wheaton on Agency*, § 473 and note; *Raymond v. Eagle Mills*, 2 *Met.* 320-7; *Curtis v. Williamson*, 10 *Q. B.* [*L. R.*] 57; A. D. 1854, per CURIAM [OAKLEY, Ch. J.], *Nason v. Cockcroft*, 3 *Duer*, 69, 366). 2. Neither do legal proceedings "prosecuted to judgment" against either principal or agent discharge the other, until the vendor has had satisfaction. (a.) The liability of the agent arises out of the actual contract, and therefore can only be discharged by satisfaction, or by an estoppel from some act of the vendor whereby it becomes inequitable to hold the agent longer liable. (b.) This precise point was decided in Philadelphia (*Beymar v. Bonsal*, 2 *Weekly Notes of Cases, Phila.* No. 16, p. 299; 79 *Penn.* ).

BY THE COURT.—SPEIR, J.—The sale and delivery of the wheat at the "Tower's distillery," or "Blissville distillery," meaning the same place on Newtown creek, and the price agreed upon, are not disputed. The dispute is whether the plaintiff was given by the defendant when he told him the wheat was to be delivered at this distillery, the name of the firm of C. A. Steen & Co. as the purchasers who were to be charged. .

There is no doubt that the defendant was a broker and acted as such in the purchase of this wheat. Nor is there any dispute that he acted as the broker of C. A. Steen & Co. in making the purchase, or that the delivery was made to them, or that they were his principals.

The only question to be determined is, whether the sale was made to the defendant in this action, or through him to the firm of C. A. Steen & Co., who were the owners at the time of the distillery where the wheat was delivered. There being no exceptions to evidence in the case or to the charge, and no request

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Opinion of the Court, by SPEIR, J.

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to the judge to rule upon any question of law, or to submit any particular question of fact to the jury, there can be no question of law open for review on this appeal.

On this single question of fact the jury found for the plaintiff. The exception to the refusal of the judge to dismiss the complaint or to direct a verdict for the defendant must be considered merely formal, unless the weight of evidence is clearly in favor of the defendants on this the only question for the determination of the jury.

The principles of law applicable to this case are elementary, and I do not think they can be disputed by counsel.

If the defendant, although known to be a broker, did not disclose his principals at the time of the sale and delivery of the wheat, and the credit at the time was given by the plaintiff, exclusively, to him, he promising to pay the amount, the defendant is liable for the price of the goods. The instances when an agent purchasing goods for another is himself liable, are when the fact that he is acting as agent is known to the vendor at the time of the sale, but the name of the principal is unknown and he does not disclose it; when the fact that he is acting as agent and the name of the principal are both unknown to the vendor at the time of the sale, and he does not disclose the fact that he is acting, and give some person as his principal; when he makes himself a party to the contract by causing the credit to be given to himself, or by promising to pay.

On the part of the defendant it is in evidence, that at the time he made this purchase, he not only made it on behalf of Steen & Co., but that he disclosed the fact to the plaintiff; that the wheat was to be sent to the mills owned by Steen & Co.; that the credit was given to them, and that the plaintiff must look to them. This testimony seems to have been corroborated by the testimony of the witness Richardson.

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Opinion of the Court, by SPEIR, J.

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On the part of the plaintiff, it is in evidence that he had no knowledge of the firm of Steen & Co. ; that they were not disclosed to him by the defendant as his principals for whom the purchase was made ; and that the wheat was charged to the defendant exclusively ; and that he promised to pay upon the presentation of the bill to him for payment.

The fact of the plaintiff's instituting a suit against the principal, in which he failed to collect his debt, does not prevent his bringing an action against the agent, if he became liable for the payment at the time of the sale.

This court says in a similar case, "where an agent purchases goods without disclosing the name of his principal, he is not discharged from his liability which he thus incurs, by the subsequent discovery of the name of the principal. The only effect of the discovery is that the principal and agent are both liable, and the seller may at his election proceed against either or both" (Nason v. Cockcroft, 3 *Duer*, 366; Coleman v. Bank of Elmira, 53 *N. Y.* 394). The suit brought against Steen & Co. was discontinued, and there has been no satisfaction of the claim through that suit. The sum of \$1,800 has been obtained, inferentially, from that firm on account of this sale, and the defendant on the trial had the benefit of this sum by a deduction from the claim to that extent.

The evidence in the case relating to the main question was conflicting and proper in all respects to be submitted to the jury for determination. Upon a review of the testimony on the trial and especially of the charge of the learned judge to the jury, I think there is no ground for reversing the judgment. It must be affirmed with costs.

CURTIS, Ch. J., concurred.

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Statement of the Case.

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THE NATIONAL TRUST COMPANY, PLAINTIFF  
AND RESPONDENT, v. ANDREW L. ROBERTS  
AND LYDIA J. ROBERTS, IMPEADED WITH  
OTHERS, DEFENDANTS AND APPELLANTS.

I. CONSPIRACY TO DEFRAUD, CIVIL ACTION FOR.

1. PROOF, ORDER OF.

(a.) PRE-CONCERT OF ACTION.

1. Not always necessary to first give evidence sufficient to establish *prima facie* pre-concert of action.

1. *Uttering forged paper.* When the action is to recover damages by reason of a loan having been obtained on forged paper, and the defendants are charged with conspiring to manufacture and utter the paper, and to obtain the loan thereon, evidence of what occurred between the person making the loan and the defendant applying for it, of the declarations of that defendant made in and about obtaining the loan, of the means employed by that defendant to inspire confidence, and of the fraudulent character of such means, is admissible without first introducing evidence as to pre-concert of action.

1. PROCESS NOT SERVED. This notwithstanding that such person, although named as a party defendant, has not been served with summons, and neither appears in, nor defends, the action.

2. EVIDENCE, WHAT ADMISSIBLE.

(a.) FINANCIAL CONDITION OF CONSPIRATORS.

1. Where money alleged to have been obtained from the plaintiff through the conspiracy in relation whereof the action is brought, has been attached in the action, *evidence of the financial condition of the conspirators* while the scheme of the conspiracy was in progress, and when it was carried into effect, *is admissible.*

II. WITNESS, INCOMPETENCY OF.

1. Infamous crime, conviction of in another State or foreign country.

(a.) *Does not render him incompetent as a witness in this State.*

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Respondent's points.

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Before CURTIS, Ch. J., and SPEIR, J.

*Decided January 2, 1877.*

This action was brought by the plaintiffs, a corporation under the laws of the State of New York, against the defendants, to recover the sum of \$30,000, and interest, which sum was advanced by the plaintiffs upon forty-two forged bonds of the Buffalo, New York & Erie Railroad Company, on July 5, 1873.

The loan was made to the defendant, Charles Ralston, who was not served with process, he having run away as soon as he obtained the money from the plaintiffs. The plaintiffs claim that the defendants conspired together to get up and put upon the market these forged bonds, and to divide the moneys obtained among them—that a large amount of money was obtained upon bonds similar to those upon which the plaintiffs made the loan, and at about the same time and from various parties.

The defendants, Andrew L. Roberts and Valentine Gleason, answered separately. Lydia J. Roberts, Horace S. Corp and Amelia A. Gleason, each put in separate answers. All the answers contained a general denial of the allegations in the complaint.

The jury, under the charge of the judge, rendered a verdict for the sum of \$33,685.50.

*Arnold, Elliott & White*, attorneys, and *Richard C. Elliott*, of counsel, for respondents, on the points discussed by the court, urged:—I. The testimony of Fontaine S. Pettis, taken under commission in Massachusetts, was properly admitted. 1. Pettis, at the time his testimony was taken, was serving out his term of imprisonment for the crime of forgery; he was tried and convicted in Massachusetts. Defendants objected to his evidence being received, upon the ground that

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Respondent's points.

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the statutes of this State disqualify him from testifying. Our statute provides, "No person sentenced upon a conviction for felony shall be competent to testify in any cause, matter or proceeding, civil or criminal, unless he be pardoned by the governor, or by the legislature, except in the cases especially provided by law; but no sentence upon a conviction for any offense other than a felony shall disqualify or render any person incompetent to be sworn or to testify in any cause, matter or proceeding, civil or criminal" (3 *R. S.* [Banks' 5th Ed.] 988, § 33). 2. This provision of the statute is penal, and the same must be strictly construed. 3. The statute refers to a conviction within this State, and not to a foreign conviction; that such was the intention is shown by the provisions of the statute relative to punishment upon subsequent convictions (3 *R. S.* [Banks' 5th Ed.] 985, §§ 9, 10). 4. The statute, section 9, provides for a longer term of imprisonment upon a subsequent conviction, and section 10 expressly provides that "every person who shall have been convicted in any of the United States, or in any district or territory thereof, or in any foreign country, of an offense, which if committed within this state would be punishable by the laws of this state by imprisonment in a state prison, shall upon conviction for any subsequent offense committed within this state, be subject to the punishment herein prescribed upon subsequent convictions in the same manner and to the same extent as if such first conviction had taken place in a court in this State." This section of the statute precedes the section first stated prohibiting the receipt of evidence upon a conviction, and only some three pages; if it had been the intention to disqualify upon a conviction out of the State, the statute would have so provided. Under the laws of the State of Massachusetts, where Pettis was convicted and was serving out his term of imprisonment, his testimony



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was competent. By the general statutes of Massachusetts of 1860, chap. 131, sec. 13: "No person shall be excluded by reason of conviction, &c., from giving evidence either in person or by deposition, &c. But conviction may be shown to affect credibility." Again, under laws of Massachusetts, 1867 to 1872, chap. 393, sec. 1: "No person of sufficient understanding shall be excluded from giving evidence as a witness in any proceeding civil or criminal in court or before a person having authority to receive evidence," except in certain cases (and those cases do not exclude the evidence in question); and it is expressly provided that the testimony is not prohibited by reason of conviction, &c., as before stated and that the conviction could be shown to affect his credibility. In *Commonwealth v. Green* (1822), (17 *Mass.* 514), it was decided that the conviction of an infamous crime in a foreign country, or in any other of the United States, does not render the subject of such conviction an incompetent witness in courts of this State. And see *Commonwealth v. Hall* (4 *Allen*, 307). These decisions were before any special statute had been passed, and were decided on common law principles alone. In this State, in case of *Cole v. Cole* (50 *How. Pr.* 60), WESTBROOK, J., passes upon the question in that case; a motion was made for a new trial, and upon such motion the affidavit of one Canter was presented. Canter was at the time serving out a term of imprisonment for nine years and six months in Pennsylvania, having been convicted of forgery, and the affidavit was made in prison. Justice WESTBROOK received the affidavit, holding that the conviction in another State would not probably render his evidence here inadmissible, and passes upon it in deciding the motion. Also see *Greenleaf on Evidence*, vol. 1 (Redfield's edition), 423, § 376. 6. Under the new revision of statutes of New York, section 832, it is provided that a conviction for crime does not

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exclude the witness, but the conviction may be proved for the purpose of affecting the weight of his testimony ; may prove it by his cross-examination ; witness must answer any questions relevant to that inquiry ; and the party cross-examining is not concluded by witness's answers (*Code of Remedial Justice [Throop]*, ch. I.—XIII. 275 ; *Laws of 1876*, § 832, p. 158, of the act relating to Courts, &c. See the able remarks of Mr. Throop in his notes to this section, at p. 163 of the notes).

II. The exception taken to the admission in evidence of the transaction between Mr. Mangam, the president of the Trust Co., and Ralston ; the admission of the forged bonds ; the paper signed by Ralston ; the check given Ralston by Mr. Mangam, and a photograph of the man Ralston, identified by Mr. Mangam, is untenable ; the evidence was all proper. Plaintiffs must commence their case somewhere, and the proper way to commence was, as they did, at the beginning ; the conspiracy had to be proved by separate and distinct acts of the parties. Every act and declaration of each one of the parties conspiring is admissible (1 *Greenleaf on Evidence*, § 3 [Redfield's edition], vol. 3, §§ 89–97). And the order of proof was entirely discretionary with the judge.

*Ambrose H. Purdy*, attorney and counsel, and *A. Oakey Hall*, counsel for appellant, on the points discussed by the court, urged :—I. The exception to the testimony, respecting transactions of plaintiff with Ralston, and Ralston with Fellows, before any evidence had been given as to pre-concert of action, were well taken. 1. If the theory of the plaintiff's case was that Ralston and the Roberts defendants were conspirators, the order of proof is imperative, and some evidence tending to show pre-concert of action must be given (1 *Greenlf. Ev.* [Redfield's ed.] § 111 ; *Ormsby v. People*, 53 *N. Y.* 473). And in all joint wrongs there must be

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proof of participation in the same wrongful acts (2 *Hilliard on Torts*, 457). 2. If the theory was that the Roberts were responsible for the uttering of the bonds, should they be proven to have participated in their forged manufacture, then the testimony about Ralston should have been confined to his acts in the uttering. But the court admitted the forged letter of introduction which he brought. This was utterly inadmissible, without proof towards a conspiracy of Roberts with Ralston, for it was an independent act of fraud not necessarily connected with the uttering, and tended to prejudice the jury. And equally inadmissible if, without proof of conspiracy, plaintiff sought to raise the presumption of law which the court charged respecting responsibility of Roberts for the results of Ralston's uttering. Inadmissible because no connection for Roberts shown with the forged letter. This ruling would be making an original wrong-doer responsible for the means and method of accomplishing the wrong, when the law for necessary public protection sometimes made him merely responsible for the results, although no connection may have been established between the original wrongdoer and a subsequent one. The court carried the error very far, when it also ruled in under exception "all declarations of Ralston that formed part of the loan," and all acts. The material question (assuming *argumenti gratia*, plaintiff's theory and the correctness of Judge SEDGWICK's charge) should have been confined to the inquiry, viz. : did Ralston utter to plaintiff forged paper, and with what damage? All testimony beyond that tended to accumulate prejudice. Counsel for plaintiff, and the court, at this stage, seemed to have acted upon the idea that Ralston and Roberts were conspirators in the uttering. The same reasoning will assign similar error in the testimony of M. Fellows respecting forgery of the letter of introduction.

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II. The testimony of Pettis was incompetent. Upon the common law rule of evidence governing records, which prove convictions for felony, authorities differ. But before discussing the common law rule, let us refer to the statutory one of evidence upon this subject in New York. The 2 *R. S.* 701, § 23, says: "No person sentenced upon a conviction for felony shall be competent to testify in any cause, matter, or proceeding, civil or criminal, unless he be pardoned by the governor, or by the legislature," &c. The court below construed this as if it read only persons sentenced for felony in this State, &c. But while the revisors were, of course, laying down a rule of evidence for our courts, yet their words "or by the legislature," show that they intended, in ratifying a common law rule, to apply it universally to the principle of infamy; because, in our State, the legislative can have no power to pardon. And the phrase indicated that the rule referred to convictions in other States. Pardon power was restricted by the then constitution (1822) to the governor (art. 3, § 5), except in treason. However, by the common law, every felon while undergoing sentence *sub modo extra legem positus*, or while awaiting execution, was *civiliter mortuus* (*Co. Litt.* 130a, 133a). And other provisions of the *Revised Statutes*, § 19, in regard to suspension of civil rights, were simply declaratory of the common law (see Revisor's notes to the section). The main feature in the individual punishment of a felon, while undergoing sentence, was the appalling one that he had no legal status. In the language of BALCOM, J., *Freeman v. Frank* (10 *Abb. Pr.* 371), "The rights and liabilities of a person civilly dead, are as entirely gone as though he were dead." Equally so for *extra legem positus* when his rights are civilly suspended, although not absolutely dead. "The suspension of legal rights begins with sentence" (per PARKER, J., *Miller v. Finkle*, 1 *Park.*

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*Cr.* 377). This court, in *O'Brien v. Hagan* (1 *Duer*, 664), considered this suspension question so as to allow an abatement of suit when plaintiff's civil rights were affected by incarceration for a term. The Massachusetts statutes confer upon its convicts the right to give testimony, but, of course, only in Massachusetts courts. Thereby showing that the common law rule of evidence had to be repealed or modified by statute. Thus New York, within its own courts, denies the right of testimony to all convicts whose testimony is therein offered, while Massachusetts confers the right upon convicts testifying in its courts. Pettis, by his commission-testimony, entered the superior court precisely, in law, as if plaintiff had brought him into the witness box, before judge and jury, from the Charlestown State prison in custody of a keeper, and by some arrangement with officials. All *de bene esse* testimony is only admissible when the oral examination of the witnesses under it would also have been admissible. The court and the counsel for plaintiff treated the question below, throughout, as if Pettis came on the stand as a freeman, while a record of former conviction, with sentence upon it fully served out, had been introduced to disqualify him. It is to such kind of presentation of witnesses that every one of the decisions regarding foreign convictions attaches. But our present objection presents a more formidable front. Our objection went to the absolute incapacity of Pettis as a witness. He is a convict undergoing sentence. He is *positus sub modo extra legem*. He cannot make an affidavit. He cannot execute a paper. Perhaps (yet this is doubtful) he might in his own case and to protect his own rights (*O'Brien v. Hagan*, 1 *Duer*, 664, see concluding words of opinion), but not as against rights of others. An authority (in 2 *Stra.* 1148) allowed the affidavits of convicts in personal exculpation. Pettis stood in court on the same footing as a

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lunatic. There was temporary civil incapacity. He possessed *infamia juris* (*Phillips on Ev.* chap. 3 of text) as distinguished from *infamia facti* (*Ib.*). The rule came to Saxon, from the Roman law: *Publico judicio damnati non sunt ad testimonii fidem* (*Dig.* 1, 22 *tit.* 5 *de Testibus*, art. 3, § 5). To "credibility destroyed," was added "absolute incompetency." It is the suffering of the punishment and its termination which restores the competency under some of the authorities (1 *Phillips, ib.*). This logically shows that during punishment the incompetency is absolute. "It does not seem clear whether the restoration to competency by suffering a sentence has proceeded on the ground of incompetency being in the nature of punishment, or on the ground of a regenerating effect of punishment upon the moral feelings," &c., &c., &c. (Note 18 of *Cowen & Hill*). Regarding the argument by respondents that this State will not take notice of records or punishments in other States, *Cowen & Hill*, note 13, says: "A person convicted of infamous crime in one State was held incompetent in another, within the provisions of the constitution of the United States, and of the act of Congress declaring the effect of the records of one State in every other." Even this was as to effect of record of conviction on a witness who had served sentence. So that the testimony of Pettis would be objectionable on authority upon either ground. 1. His competency is suspended because undergoing punishment—or in other words, he is temporarily incapacitated. 2. Had he served out his punishment, even, the foreign record of his conviction ought, on principle, to have excluded. And, in reading the State Prison code of our own State (which is ch. 460 of the *Laws of 1847*), it is impossible not to observe how clearly there runs throughout it a recognition of the common law principle that civil disability during imprisonment is part of the punishment. Even when

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one convict committed an offense against another, the sufferer could not be a witness at common law, and sections 150 and 151 of that code were passed to make an exception to the ordinary incompetency. In Great Britain, by 6 & 7 Vic. c. 85, "incapacity from crime" has been removed. Yet this is only to the "discharged," *and not to the convict under sentence*, as it would so appear from last edition of Best, section 141 (*Morgan's Best on Ev.* ed. 1875, vol. 1, p. 219). Perusal of the narrative given by Pettis must show to the court the soundness (upon grounds of protection to suitors and the community) of the incapacity rule which we have endeavored to show has been established as against a convict expiating his offense. Convicts are, in their feelings, while undergoing imprisonment, *hostes humanis*. They are embittered; and their sense of personal injury becomes superior to moral obligation or regard for individual rights. The answers of Pettis are, throughout his narrative, only abusive conclusions, and while the judicial or the logical mind might not be deceived by his answers, a juryman readily would be. Not only is the common law correct in excluding the testimony of a convict while within prison walls, because that his incapacity shall be part of his punishment, but because his disregard of social obligations apparent in his original infamy is heightened by his anger at the restraints. Especially is it so of Pettis, who claims to testify against those whom he regards as his enemies.

BY THE COURT.—SPEIR, J.—The first proposition advanced by the appellants is that assuming the theory of the plaintiff's case to be that Ralston and Roberts and wife were conspirators, the order of proof was imperative, that some evidence tending to show pre-concert of action must be given.

In other words that the testimony showing that



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Ralston made the application to the plaintiffs for the loan of the money claimed in the complaint upon these bonds as security, and that to inspire confidence he presented a forged letter of introduction, and their evidence as to his declarations made in and about obtaining the loan was inadmissible without first giving evidence of the conspiracy, on the ground that it was an independent act of fraud not necessarily connected with the uttering of the bonds, and tending to prejudice the jury.

It is important to see what part Mr. Ralston took in this enterprise. He had an office at No 58 Broadway, room 11, in this city, and was or pretended to be a broker. He was unknown to the president of plaintiff's company, with whom he conducted the negotiation. and presented a forged letter of introduction from George A. Fellows, who was a trustee in plaintiff's company. In two or three days thereafter he obtained the loan on these spurious bonds. He who was known as Charles Ralston at 58 Broadway boarded at the house of a respectable family by the name of Thomas, at No. 257 West Fourteenth street in June, 1873, and had also resided with this family at No. 312 West Fourteenth street, and was known at both places by this family and other boarders as Walter Stewart. The defendants Mr. and Mrs. Gleason visited him there. Stewart (Ralston) left Mr. Thomas's house after obtaining the money from the plaintiffs, in June, 1873, and that was the last they saw of him. Stewart's conduct was such, while at Mr. Thomas's house, that his real character was not known or suspected, and when they first heard of the report of his fraudulent transactions, Thomas called upon the defendant, Gleason, whom he knew only as a friend of Stewart, and was astonished when they denied knowing him, or that they had ever been at Thomas's places of residence. Ralston's bank book on the Fourth National Bank was found in the box of



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defendant Valentine Gleason, at the New York Safe Deposit Company. This bank was the one in which Ralston kept his accounts and in which the plaintiff's check was deposited by him. No explanation was offered on the trial of the facts disclosed by this testimony.

Looking at the complaint it would seem that the testimony of the president of the plaintiff's company relating to the application for the loan, the security upon which it was made, the person negotiating it, and all the circumstances under which it was actually completed, would be the first step to be taken on the part of the prosecution. The action was for the recovery of this money obtained fraudulently upon fictitious and counterfeit bonds. The fact of the loan being made was the first thing to be established. The theory of the plaintiff's case is not that the defendant Roberts was alone responsible for the uttering of the bonds. The fact clearly appears that Ralston was the defendant who first put them on the market. A man utters a false note or bond who gives it in payment or security knowing it to be false. This was what Ralston did. He presented a forged letter of introduction purporting to have been written by one of the trustees of the plaintiff's company, and upon it was enabled to secure the confidence of the plaintiffs in obtaining the money and receiving these worthless bonds as security for the repayment. This testimony of the president therefore directly proved that Ralston took the first step in the *uttering*. Prior to the time of making this loan, it appears that Stewart (Ralston) was interviewed by Mrs. Pettis for the purpose of ascertaining whether the defendants, Roberts and Gleason, were going to dispose of these bonds. That he stated "they had changed their minds somewhat about sending them to Europe, or how they were to put them on the market." He said, "Tell your husband he thought they were

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going to get a loan on them, and the balance they would send to some of the Western States.”

As a general rule a foundation must first be laid, by proof, sufficient in the opinion of the judge to establish *prima facie* the fact of conspiracy between the parties to be laid before the jury. The connection of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy in pursuance of the original concerted plan, is in contemplation of law the act and declaration of them all (1 *Greenl. En.* [Redfield's Ed.] § 111). The facts thus disclosed at the commencement of the trial on the examination of the first witness were more than *prima facie*, and did not rest even in the discretion of the court. It was not possible that the jury could be misled to infer itself of the fact of conspiracy, from the declaration of a stranger. Ralston was no stranger in the design and plan to defraud. He was the leading conspirator. This clearly takes the case out of the rule insisted upon by defendant's counsel, that the obtaining the money by Ralston, and the introduction of the forged letter, were independent acts of fraud unconnected with the conspiracy of Roberts with Ralston.

It is claimed that the testimony of S. Pettis was improperly admitted.

At the time this testimony was taken under commission in Massachusetts, Pettis was serving out his term of imprisonment for the crime of forgery. He was tried and convicted in Massachusetts, and the evidence was objected to upon the ground that the statute of this State disqualifies him from testifying.

By the general statutes of Massachusetts, “No person shall be excluded by reason of conviction, &c., from giving evidence either in person or by deposition, &c.”

Our statute provides, “No person sentenced upon a conviction for felony shall be competent to testify in any cause, matter or proceeding, civil or criminal, un-

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less he be pardoned by the governor or the legislature, *except in the cases especially provided by law.*”

The provision of the statute is penal, and must be strictly construed. The conviction referred to must be within this State. It is well settled that penal laws of one State do not extend into another. Personal disqualifications not arising from the positive law of the country, and especially such as are of a penal nature, are strictly territorial, and cannot be enforced in any country other than that in which they originated (*Story on Conflict of Laws*, §§ 91, 92, 620–625; 1 *Greenl. on Ev.* § 376). The case is decided in 17 *Mass.* 513, *Commonwealth v. Green*. The court say that the conviction of an infamous crime in a foreign country or in any other of the *United States*, does not render the subject of such conviction an incompetent witness in the courts of that State. This decision was made before any special statute was passed, and was made upon common law principles (see *Cole v. Cole*, 50 *How. Pr.* 60).

The objection to the 13th interrogatory, under which the 18th, 19th, 20th, 27th–35th interrogatories were answered, does not appear to be well taken. The question was certainly proper, as it asked for the knowledge which the witness had about the getting up of *the said forged bonds*. The 25th interrogatory, calling for the financial condition of the defendants or either of them, prior to the time said bonds were prepared and issued, was pertinent. The action was for recovery of this money obtained from the plaintiffs by the complicity and pre-concerted action of all the defendants, and which money had been *attached*. It was an important question, therefore, for the jury to know what means they had, if any, when they got the bonds up and issued them.

I fail to see any grounds for the nonsuit. The court did charge that the jury might sever in *their* ver-

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dict: that if they believed the evidence established participation by some of the defendants only, their verdict would be against them and in favor of the others. This was as far as the case would warrant the judge in going. He told them they must discriminate in the case of Corp, Mrs. Gleason and Mrs. Roberts.

I have carefully looked into the several refusals to charge, and to the direct charge, and am of the opinion that all the objections specified by the defendant's counsel on this appeal should be overruled.

It appears to me that the case has been fairly tried upon the evidence requisite to a correct result; and although some evidence of minor importance may have been erroneously admitted, it is manifest that its rejection could not have changed the result.

The judgment and order must be affirmed.

CURTIS, Ch. J., concurred.

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Statement of the Case.

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THOMAS F. MASON, PLAINTIFF AND RESPONDENT,  
v. NICHOLAS H. DECKER, DEFENDANT AND  
APPELLANT.

**MUTUAL AGREEMENT.**

An agreement in writing, whereby a party who executes the same promises to buy certain property of a party named in the agreement (but who does not execute the same), is valid if supported by a sufficient consideration, and such consideration may be proved by parol, and may consist of the promise or engagement to sell the property described in the agreement, on the part of the other party named therein, but who did not execute the same (*Justice v. Lang*, 42 N. Y. 498; 52 *Id.* 323).

This principle applied to the case at bar, and in support of a recovery on such a contract, where the mutual agreement of the parties and the consideration of the contract was fully established by parol proof.

Before CURTIS, Ch. J., and SANFORD and FREEDMAN,  
JJ.

*Decided March 5, 1877.*

Appeal by the defendant from a judgment for \$15,993.92 entered upon the verdict of a jury, and from an order denying a motion for a new trial.

The action is brought to recover the cost price of 133 shares of stock, of the "New York Construction Company," which the plaintiff alleges were purchased by the defendant on June 30, 1873, to be paid for on October 10 following, or previously, at defendant's option. The plaintiff further alleges that it was agreed that the plaintiff should transfer the stock to the defendant or to his order as the payments for the

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same should be made, and that the defendant subscribed a memorandum of such contract, but thereafter refused to accept the stock or to pay for the same, when tendered on October 10.

The answer put in issue the ownership of the stock by plaintiff, also, the mutuality of the alleged agreement for the purchase of the stock, and denied the making of such a contract as was set up in the complaint. It also avers that the plaintiff never executed or delivered to the defendant any counterpart of the alleged agreement. That there was no consideration for the same.

The answer also denied any promise to pay for the stock or any indebtedness to plaintiff. Exceptions were taken by defendant to rulings of the court on the trial, also to the charge of the court and to refusals to charge.

The jury found a verdict for the amount claimed. The defendant moved for a new trial on the exceptions, on the ground that the verdict was against the weight of evidence, and also upon the grounds stated in section 264 of the Code. The court denied the motion, and the defendant excepted. From the judgment entered on the verdict, and from the order denying a new trial, the defendant appealed.

*James M. Smith*, of counsel, *Samuel G. Courtney*, attorney, for appellant.

*Wm. H. Scott*, for respondent.

BY THE COURT.—CURTIS, Ch. J.—It is insisted by the defendant, that the agreement which is subscribed only by him, is invalid for want of mutuality, and can not be enforced for want of consideration.

The case of *Justice v. Lang*, (42 N. Y. 493; 52 Id. 323), and MSS. opinion on the third hearing of the same

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by the court of appeals, establishes the doctrine that a promise of the nature of the defendant's in this action was valid if supported by a sufficient consideration, and that such consideration may be proved by parol, and may consist in the promise or engagement of the plaintiff.

The evidence, with very little conflict, showed that in April, 1873, the plaintiff held 143 shares of this stock, and that the defendant then verbally agreed that if the plaintiff would sign a certain subscription paper, binding himself to advance certain moneys in an enterprize wherein they were both interested, he would by July 1 following, take and pay for all the stock and bonds in this company held by plaintiff at cost and interest.

The plaintiff then signed the subscription paper, and verbally agreed to so sell the stock and bonds. After this, ten shares of the stock were taken by the defendant of the plaintiff and transferred to a Mr. Stanton, and paid for by his note indorsed by the defendant, which was paid.

Previous to June 30, the defendant declined to sign a memorandum of this agreement, and thereupon, in consideration that the defendant would sign the memorandum of agreement sued upon and dated June 30, 1873, the plaintiff released him from his obligation to take the bonds of the company, limiting the agreement to the taking of the 133 shares of the stock then remaining, in which form the defendant signed it.

These facts, together with repeated tenders of the stock to the defendant, and demands of payment from him, in pursuance to the obligation in suit, of what was shown to be the cost price of the stock and interest, were proved at the trial.

The weight of evidence sustained the jury in finding that the defendant signed and delivered the memorandum of agreement as his contract and obligation,

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and that it was supported by a sufficient consideration, the court properly instructing them, if they found otherwise in either of these respects, their verdict must be for the defendant.

The plaintiff sues to recover upon defendant's contract a sum agreed to be paid by the defendant for a certain number of shares of stock, all of which were sold to him and ten of which were delivered. The obligation of the defendant contains a clause that as payments are made, the stock shall be transferred subject to his order. It was the plaintiff's right, after he had tendered the undelivered stock, to sue for the price in accordance with the provisions of the obligation. The defendant had procured the plaintiff to make the subscription heretofore referred to, by promising to take the stock, and after he had obtained the subscription from the plaintiff, which was the consideration for his agreement, and had received a part of the stock, the contract was so far executed, that the plaintiff was entitled, the jury so finding the facts, to the rule of damages charged by the court.

The court charged the jury correctly, and there are no exceptions to the rulings at the trial that are well taken.

The judgment and order appealed from should be affirmed.

SANFORD and FREEDMAN, JJ., concurred.



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Statement of the Case.

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JOSEPH G. MILLS, PLAINTIFF AND RESPONDENT,  
v. JAY GOULD, IMPLEADED, &C., DEFENDANT  
AND APPELLANT.

DEMURRER TO COMPLAINT.

FACTS STATED, NOT SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

The complaint claimed damages for the non-fulfillment of a contract for the sale and purchase of gold.

It alleged that the sale and purchase was made under and in accordance with, the rules of the gold exchange, and that said rules formed part of the agreement, and that one of them, controlling the contract, provided, that on all contracts made at the board, either party might require a deposit of twenty per cent. as security, &c. That after notice, &c., under this rule, the defendant refused to make this deposit, and plaintiff afterwards sold the gold at a lower rate than the price named in the contract, &c.

*Held*, that although the rule of the gold exchange is expressly confined to the contracts made at its board, yet if parties choose to agree that their contracts shall be governed by, and be subject to, the rules of the gold exchange, they can do so, and such rules may be resorted to, in ascertaining the character, and the fulfillment or breach of such contracts, so far as those rules control or relate to the same, and the allegations of the complaint are sufficient to bring the contract under the control and interpretation of the rule set out therein.

The effect of this rule is that a failure to deposit as therein provided, constitutes a breach of the contract that is made subject to it; and not only that, but it also gives the aggrieved party an immediate right of action for his damages; proof of tender or readiness to perform becomes unnecessary. The defendant, by his refusal, caused a failure to complete the contract, and cannot now avail himself of the non-performance that he has occasioned (*Clark v. Crandall*, 27 *Barb.* 73; *Moses v. Bierling*, 31 *N. Y.* 462; *Nelson v. Plimpton F. E. Co.*, 55 *Id.* 484). The plaintiff in this case was not the pledgee of the gold. On the failure of the defendant to complete the contract he could resume his original rights in respect to the gold, and could sell if unrestricted by any obligation to give notice to the

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defendant (Pollen v. Le Roy, 30 N. Y. 556 ; Dustun v. McAndrew, 44 Id. 78; Lewis v. Greider, 49 Barb. 635).

Before CURTIS, Ch. J., and SANFORD and FREEDMAN,  
JJ.

*Decided March 5, 1877.*

Appeal from an order overruling defendant's demurrer to the amended complaint.

*Thomas G. Shearman*, for appellant.

*Thomas F. Wentworth*, for respondent.

BY THE COURT.—CURTIS, Ch. J.—The defendant demurs on the ground, that the complaint does not state facts sufficient to constitute a cause of action.

The complaint alleges two causes of action ; one in the plaintiff's own right, and the other as assignee of Jameson, Smith and Cotting. With this exception they are alike in form, and may be considered as one. The complaint in substance states, that on September 24, 1869, the plaintiff and defendant, at the city of New York, made and entered into a contract, whereby the plaintiff sold the defendant, and the defendant bought of the plaintiff, \$1,000,000, gold, and agreed to pay therefor \$1.60, currency, for each dollar thereof, and that the sale and purchase were made under and in accordance with the rules of the gold exchange, and that said rules formed part of the agreement so made with the defendant, and that one of them, controlling the contract in question, provided, that on all contracts made at the board, either party might require a deposit of twenty per cent. as security for the fulfillment of the contract, to be made within one hour after such notice, and in case of difference of opinion as to the

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place of deposit, it was required to be made in the United States Trust Company.

The complaint further alleges that the plaintiff notified the defendant on September 24, 1869, to deposit twenty per cent. of the purchase price as security for the fulfillment of the contract, and the defendant refused to make the deposit which he had agreed to do in accordance with said rule and said contract, and notified the plaintiff of his refusal. That the plaintiff, on September 30, 1869, sold the gold belonging to the defendant's account at the highest bid per dollar to be obtained therefor, \$1.32, currency, which was the highest market value of gold in the city of New York, between September 24, the day of the breach of the contract, and the day of sale. That by reason of the failure of the defendant to keep and perform the terms and conditions of the contract, and the consequent breach thereof, the plaintiff has suffered damages in the sum of \$280,000, which sum remains due and unpaid.

The defendant's position is, that admitting every allegation in the complaint, no cause of action is stated. The complaint does not allege that the contract in question was made at the board of the gold exchange; nor is it to be assumed that it was so made. The rule, by its terms, is expressly confined to contracts made at the board; but if parties to gold contracts, made outside of the board, choose to agree to be governed by, and to have them subject to the rules of the gold exchange, they can do so, and such rules may be resorted to in ascertaining the character, and fulfillment or breach of the contracts, as far as they control or relate to the same. But the defendant claims that the complaint does not allege that the rules adopted on all contracts made at the board, formed part of their agreement. The allegation in the complaint is, that the sale and purchase were made under and in accord-

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Opinion of the Court, by CURTIS, Ch. J.

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ance with the rules of the gold exchange, which rules formed part of the agreement between the parties, and among others contained the provision, controlling the contract in question, authorizing the requirement of twenty per cent. deposit, and specifying the effect of a failure to make such deposit.

This allegation of the complaint sufficiently brings the contract under the control and interpretation of the rule set out in the complaint. Under this rule the parties agree what shall constitute a breach of the contract. It specifies that a failure to make the deposit within the designated time shall be considered a failure to complete the contract. In other words, that the party thus failing to make the deposit shall be deemed not to have fulfilled it on his part. The effect of this is that the parties agree that such failure to deposit constitutes a breach of the contract made subject to the rule, and that such refusal to deposit is not only a breach of the contract, but it gives the other party an immediate right of action for his damages, without waiting for the time of performance to arrive before bringing his action, the defendant having by his act put it out of his power to perform on his part (*Christo v. Armour*, 34 *Barb.* 387). It fails to operate as a rescission of the original contract.

If the contract had been made irrespective of this provision for a deposit with its declaration of the effect of failure to make it, either party, to put the other in default, would have been obliged to aver and show that he was ready or offered to perform. But by this provision, the defendant is put in default in consequence of his omission to perform an act absolutely required of him irrespective of the other terms of the contract; and upon that default the plaintiff's right of action immediately accrues. The parties having agreed to be governed by this provision, a failure to comply with which operates as a breach of the contract, proof of

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Opinion of the Court, by CURTIS, Ch. J.

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tender or readiness to perform becomes unnecessary to put either party in default, and is waived. The defendant, by his refusal, having caused a failure to complete the contract, cannot now avail himself of the non-performance he has occasioned (*Clark v. Crandall*, 27 *Barb.* 77; *Moses v. Bierling*, 31 *N. Y.* 464; *Nelson v. Plimpton F. E. Co.*, 55 *Id.* 484).

The plaintiff was not the pledgee of the gold. On the failure to complete the contract he could resume his original rights in respect to the gold. He was at liberty to sell it unrestricted by any obligation to give notice to the defendant (*Pollen v. Le Roy*, 30 *N. Y.* 556; *Dustan v. McAndrew*, 44 *Id.* 78; *Lewis v. Greider*, 49 *Barb.* 635). The complaint states that the plaintiff sold the gold four days after defendant's refusal, at the highest bid and at the highest market value since the defendant's breach of contract, and at \$1.32 currency for each dollar thereof. This averment shows with reasonable certainty that by the refusal and failure of the defendant to complete the contract, the plaintiff was subjected to a pecuniary loss, and the court can see from the averments of the complaint that the plaintiff has sustained damage, and that the breach of the contract is one from which, where a depreciation of market value is shown, damages would naturally flow.

Where there is a breach of a valid contract, as here, the plaintiff is entitled to recover at least nominal damages (*Blot v. Boiceau*, 3 *Comst.* 86; *Devendorf v. West*, 42 *Barb.* 227).

The defendant does not claim that the time when the delivery of the gold was to have been made is material to the plaintiff's cause of action. It is not stated in the complaint, and the the presumption is that it was to have been delivered within a reasonable time. It seems from the complaint that the cause of action sued upon arose before the time for the performance of the contract arrived. The question as to

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Opinion of the Court, by CURTIS, Ch. J.

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what relief the defendant may have by an application to make the complaint more definite and certain in this respect does not arise on this appeal.

The order appealed from should be affirmed with costs.

SANFORD and FREEDMAN, JJ., concurred.

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THE PRODUCE BANK, PLAINTIFF, v. JOSEPH  
MORTON, *et al.*, DEFENDANTS.

RE-ARGUMENT OF MOTION AT GENERAL TERM.

When it appears from the decision of the court of appeals in dismissing an appeal from the decision of the general term, that the case appealed from was not properly before the general term, a re-argument should be ordered, although this court has decided that in matters purely technical, and not affecting the general law of the case, or the real merits of the controversy, a re-argument should not be allowed (*Butterfield v. Radde*, 40 *N. Y. Superior Ct.* 169, 172).

But it should be granted on payment of costs.

Before CURTIS, Ch. J., and SANFORD, J.

*Decided March 5, 1877.*

Motion by the plaintiff for leave to re-argue the motion for a new trial, made by the defendants at the December general term, 1875.

*D. J. Newland*, for plaintiff.

*A. C. Francioli* and *J. F. Mosher*, for defendants.

BY THE COURT.—CURTIS, Ch. J.—The plaintiff sues to set aside an assignment for the benefit of creditors. The action was tried at the special term, and decided in

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Opinion of the Court, by CURTIS, Ch. J.

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his favor. The defendants moved for a new trial at general term, under section 268 of the Code. This motion was granted, and a new trial ordered. The case is reported in 40 *N. Y. Superior Ct.* 328.

The plaintiff appealed to the court of appeals, and the appeal was dismissed because the amount involved was under \$500. From the opinion, it appears that the court considered several of the questions, and came to the conclusion that under *Laws of 1874*, c. 600, it was intended to abrogate the rule, that the making and the delivery of the verified schedules required by the act of 1860, was essential to the validity of an assignment; and also that the provision allowing the assignee to file schedules within six months, was not intended as a condition, the breach of which would invalidate the assignment. The court was also of opinion, that there was no proof that there was an omission to file the bond in the county clerk's office, and that there was no allegation in the complaint of such omission. These views are adverse to the grounds upon which the plaintiff seeks to set aside the assignment.

The court of appeals further expressed itself inclined to the opinion, "that the case was not properly before the general term, that it was not a proper case for a motion for a new trial" (*Code*, § 268).

It would thus seem that the real merits of the controversy are viewed adversely to the plaintiff by the court of appeals, and that the course pursued by the defendant in moving for a new trial under section 268 of the Code, did not bring the case properly before the general term.

Although it is held that a re-argument will not be allowed here in matters purely technical and not affecting the general law of the case, or the real merits of the controversy (*Butterfield v. Radde*, 40 *N. Y. Superior Ct.* 169-172), where the court of appeals differs

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Statement of the Case.

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from this court, but as this motion involves a question affecting an important remedy, and as no appeal lies from our decision, I think the rule should be relaxed. The plaintiff, in his affidavit, as one of his grounds for a re-argument, states, that this point was not elaborately argued at the general term; but this in itself constitutes no reason for a re-argument (*Trinity Church v. Higgins*, 4 *Robt.* 372). As the real merits of the controversy have been considered by the court of appeals, and held adversely to the plaintiff, it is but just to the defendants, that they should be paid their costs thus far in the litigation, as a condition of granting the motion for a re-argument.

The motion for a re-argument should be granted, on condition that the plaintiff pay, within thirty days from the entry of the order, the defendants' costs to that date in the action.

SANFORD, J., concurred.

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OLIVER VAN EVERY, PLAINTIFF AND RESPOND-  
ENT, v. THOMAS D. ADAMS, DEFENDANT AND  
APPELLANT.

ATTORNEY AND CLIENT.

The principle that now controls the recovery by an attorney for his professional services in an action against his client, in the absence of an express agreement, is that he is simply entitled to what they are reasonably worth (*Stow v. Hamlin*, 11 *How. Pr.* 452; *Garfield v. Kirk*, 65 *Barb.* 464).

The determination or findings of a referee as to the value of such services, where there is conflicting testimony as to such value, must be affirmed.



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Opinion of the Court, by CURTIS, Ch. J.

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Before CURTIS, Ch. J., and SANFORD and FREEDMAN,  
JJ.

*Decided March 5, 1877.*

Appeal by defendant from a judgment entered upon the report of a referee.

The action is for the recovery of \$126.82 collected by the defendant as an attorney at law for the plaintiff. The defendant admits the collection of the money, but avers that the plaintiff owes him \$500 for professional services, and asks judgment against the plaintiff for the balance.

*J. Langdon Ward*, for appellant.

*John A. Taylor*, for respondent.

BY THE COURT.—CURTIS, Ch. J.—The principal question is as to the value of the defendant's professional services. There is some variance of opinion in the case on this point. The statement furnished by the defendant before the commencement of this action, showing a balance due him of \$26.18, differs from the bill of particulars he presented after the action was commenced. In the latter he showed a balance of \$339.18 in his favor. There was also conflicting testimony as to the value of the defendant's services, and as to whether he had, in some of the matters for which he charged, been retained by the plaintiff.

The principle that now controls the recovery by an attorney for professional services in an action against his client, in the absence of an express agreement, is that he is simply entitled to what they are reasonably worth (*Stow v. Hamlin*, 11 *How. Pr.* 452; *Garfield v. Kirk*, 65 *Barb.* 464).

With this view of the law, the referee appears to have determined the value of the defendant's services,

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Statement of the Case.

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and his findings are supported by evidence. When there is conflicting testimony as to the value, and as to whose retainer they were rendered on, as in the present case, there must be strong reasons to induce the court at general term to set aside the report upon questions of fact. He had the witnesses before him, and had ampler means of judging of their reliability and knowledge, than the appellate court can have by a perusal of their testimony.

No sufficient reasons are shown for setting aside the referee's report.

The judgment appealed from should be affirmed with costs.

SANFORD and FREEDMAN, JJ., concurred.

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JOHN DUNPHY, PLAINTIFF AND RESPONDENT, v.  
THE ERIE RAILWAY COMPANY, DEFEND-  
ANT AND APPELLANT.

COMMON CARRIER OF PASSENGERS.

CONTRACTS WITH ; TICKETS FOR PASSAGE; RIGHTS OF PASSENGERS  
PURCHASING SAME IN REGARD TO PASSAGE; REASONABLE RULES  
AND REGULATIONS; WHEN NOTICE OF THE SAME NECESSARY.

The rights of the passenger rest upon the contract that was made when he purchased his ticket. The benefits he gained as to times and trains, and the journey, were then settled and fixed, and the limitations of his rights were then settled and fixed.

If the whole of plaintiff's rights were set forth by the ticket he purchased (see opinion), he had a right to nothing but a continuous trip from New York to Rochester, and the ticket was not evidence of his right to take up another trip without paying fare, after he had stopped at an intermediate station.

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Statement of the Case.

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But in this case the defendants had rules and regulations, that governed or limited this ticket, and its use by the passenger, that were more favorable to the passenger, than the contract as expressed by the ticket itself. The passenger did not ask that these rules should be expressed on the ticket, and he did not even inquire about them.

In the case at bar these rules were reasonable, and did not take from passengers any right they would have at common law, under the contract as made. It is not a case where the rules seek to limit any common-law liability of the carrier, for breach of duty, &c. They enlarged and increased the rights and privileges of the passenger, beyond these embraced by the contract itself, and therefore no special or personal notice of the same to the passenger was necessary.

Ignorance of such rules and of the restrictions consequent thereof, in such a case, does not alter the contract, nor prevent the rules and the restrictions being a part thereof. They enlarged the passenger's rights and privileges of transportation, subject to certain restrictions and forms, which were reasonable, and if the one was accepted, the other was coupled and united therewith. In the present instance, although the ticket gave no privileges beyond a continuous trip, yet the rules gave the passenger all he required as to stopping on the way. He was conscious that he did not know the rules exactly, but he did not seek for any information in regard to them, and because he was ignorant of the reasonable form in which the defendant granted the privilege, he claimed the right to exercise that privilege in a form and manner devised by himself.

There was error in the charge of the judge before whom the case was tried, to the effect that the plaintiff could recover unless it was proved that he had notice of these rules and regulations that affected the ticket.

Before SEDGWICK and SANFORD, JJ.

*Decided March 5, 1877.*

Appeal from judgment on verdict.

The action was for damages for the unlawful ejection of plaintiff from the car of defendant, while plaintiff was on a journey.

## Statement of the Case.

It appeared on the trial that plaintiff bought of one of defendant's ticket agents in Brooklyn, the following ticket:

S	ERIE RAILWAY COMPANY.	E
NEW YORK		
TO		
ROCHESTER.		
Good for five days only from date.		
JNO. N. ABBOTT,		
Gen'l Ticket Agent.		
W		D

On the back is stamped the following:

J. D. MCGOWAN,	
TICKET AGENT ERIE RAILWAY,	
No. 2 Court Street,	
Feb'y 14, 1874.	Brooklyn, N. Y.

There was no testimony that the plaintiff asked for any particular kind of ticket for his journey from New York to Rochester, or that the agent made any statement of the rights of the plaintiff under such a ticket. He started from New York on January 16, 1874, and he presented his ticket to different conductors from time to time, who cut the ticket by punches at the letters E, D, and S. It subsequently was shown that these letters referred to different divisions of the defendant's road, and the letter W to the last division, from Corning west to Rochester. The plaintiff first stopped at Binghamton, which was in the Susquehanna division. On the 17th he went on, at Binghamton.

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Statement of the Case.

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When the train was a short distance from that place, the conductor asked for his ticket, and informed the plaintiff that he could not receive it, as it had been used for that division, viz. the Susquehanna division, and that the plaintiff must pay fare from Binghamton to Corning, and at Corning the ticket would be good from there to Rochester.

The defendant first refused to pay the fare. On the trial some testimony was given to show that he afterwards, before the bell was rung as a direction to stop the train, offered to pay his fare. There was opposing testimony to show that the defendant did not offer to pay fare until the bell had been rung and the train had stopped. The conductor, without violence, compelled the plaintiff to leave the train.

It was proved that a long time before the ticket was sold, the defendant had made and extensively published through ticket-offices and all passenger cars, on placards, regulations which forbade a passenger with a ticket like the one in question, stopping at a station in one division and then using the ticket for another trip on the same division, but required that if the passenger wished to stop and afterwards to proceed, he should give up his ticket and procure from a conductor another ticket to be used for the rest of the passage.

The court in substance charged the jury that the plaintiff had a right to continue his journey on the ticket he held, unless the jury should find as a fact, that he had notice of the regulations put in testimony, and also charged that these regulations were reasonable.

The defendant's counsel requested the court to charge that if the bell was rung to signal for the train to stop before the plaintiff offered to pay fare, the subsequent offer to pay did not give the plaintiff a right to go on with the train. This was refused, and the defendant excepted.

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Opinion of the Court, by SEDGWICK, J.

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The jury found for the plaintiff.

BY THE COURT.—SEDGWICK, J.—The rights of the plaintiff rested upon the contract that was made when he bought the ticket. The benefits he gained as to times and trains, and the journey, were then settled and fixed, and the limitations of his rights were then settled and fixed.

If the whole of plaintiff's rights were signified by what was on the ticket, he had a right to nothing but a continuous trip from New York to Rochester, and the ticket was not an evidence of his right to take up another trip without paying fare after he had stopped at an intermediate station. The alternative would be that he had a right to go from New York to Rochester by breaking his general passage into as many trips as he chose. This seems to me so clear that it is not necessary to cite cases to support it.

The fact that the plaintiff was left in possession of the ticket after it had been examined by the former conductor a short time before his stopping at Binghamton, could not give any new right. That conductor did not know that the plaintiff meant to break his journey, and leaving the ticket with plaintiff was but leaving a voucher of a right to proceed on a continuous passage if the plaintiff chose to use the ticket in that way.

But the whole of the contract was not manifested by the contents of the ticket, and we will suppose that the plaintiff, when buying his ticket, had in view a right to stop upon his ticket and resume his journey. The plaintiff must have known that a right to a passage of the kind he wanted, must have some limitations. The plaintiff knew that the ticket gave a right to go upon some trains only, running at certain times only, and not upon all trains at all times.

When the ticket was bought the plaintiff did not ask for a ticket which would give the privilege he

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Opinion of the Court, by SEDGWICK, J.

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claimed in this action, nor did the seller represent that the ticket would give such a privilege. The case is left, then, that the plaintiff made a contract for a passage with limitations which he knew existed, but were not expressed, and which, although he did not know their specific character, he did not ask to be expressed. Furthermore, he must have known that these limitations were such as the defendant had made by its rules.

In the present case the rules were reasonable, and did not take from passengers any right they would have by common law, to demand that the defendant should carry them. It is not a case where the carrier seeks to limit, by rule or notice, any common-law liability for breach of duty as common carrier. The defendant's rights are based upon the contract itself, voluntarily made by plaintiff, and the rules are adduced to show what the contract was.

The plaintiff swore he did not know the nature of the rules, and consequently of the restrictions. Did that ignorance alter the contract, or result in the restrictions not being a part of the contract? .

If the regulations had not been put in proof, there would have been no evidence that the defendant ever agreed to carry the plaintiff, after he had stopped at Binghamton, on a new journey from Binghamton to Rochester, without paying fare. And the rules contained only the restriction that if he wished to stop, he should procure from the conductor a new ticket without further payment.

On general principles, equity does not find a ground for annulling contracts, because the party was ignorant of the particulars of the agreement into which he intentionally entered. Mere ignorance of the exact stipulation does not show that if he had known he would not have contracted. Upon the stipulations being disclosed, if they are not extraordinary, he

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Opinion of the Court, by SEDGWICK, J.

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could not show that if he had known them, he would not have assented to them. The substantial fact would be that he voluntarily assented to the contract, limited by all reasonable, although undisclosed exceptions that were lawful. And whether these exceptions were *a* or *b*, it would not be a material inducement to the contract that they were the one instead of the other, or instead of being both.

But if the contract might have been avoided in the first instance, if the party enters upon its enjoyment and claims any part of its advantages, then all parts of the contract, unmodified, are in force.

In the present instance, the rules gave the plaintiff all he wished as to stopping. He was conscious that he did not know the exact rule, but did not ask for information as to it. In substance, because he was ignorant of the reasonable form in which the defendant had given him the privilege, he claimed a right to exercise that privilege in a form devised by himself.

I am therefore of opinion that there was error in charging that the plaintiff could recover, unless, in fact, he had notice of the regulations.

It is unnecessary to examine the other exceptions, as the one discussed is of main importance.

Judgment reversed. New trial ordered, with costs to appellant to abide event.

SANFORD, J., concurred.



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Statement of the Case.

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PHILIP A. MADAN, PLAINTIFF, v. JEROME  
COVERT, *et al.*, DEFENDANTS.

WAREHOUSEMEN ; CARE AND RESPONSIBILITY OF.

WHAT DEGREE OF DILIGENCE SHOULD BE EXERCISED BY THEM IN KEEPING OUT STRANGERS FROM THE PREMISES, OR IN PREVENTING A THIEF ENTERING UPON AND CONCEALING IN THE PREMISES IN THE DAYTIME.

In the case at bar it was contended that sufficient arrangements were not made to prevent persons entering upon the premises at the front door, without observation, and also that a rear door was left in such a state, that strangers might have entered upon the premises without being noticed.

The judge before whom the case was tried, directed a verdict for the defendants, upon the theory that the theft was committed by a person entering the premises burglariously after they were closed for the night; the direction was proper (*Coleman v. Livingston*, 56 N. Y. 658). But upon the theory that the goods were stolen by a person concealed upon the premises at the time they were closed, several questions as to the care and diligence of defendants in guarding the premises during the day, arise. To justify the direction of the judge, it should have appeared conclusively that the means used by defendants to prevent a thief from entering upon the premises in the daytime, and concealing himself there, and being locked in at closing time, were such means as were used for the purpose by owners of like property in like circumstances.

In the case at bar such was not the case, and the jury alone could determine by a verdict the conclusions of fact in the premises, and the facts should have been submitted to them.

Before SEDGWICK and SANFORD, JJ.

*Decided March 5, 1877.*

Verdict for defendant by direction of court, under

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Statement of the Case.

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exceptions ordered to be heard in first instance at general term.

The action was for damages for non-delivery upon demand of segars stored by plaintiff with defendants as warehousemen.

The important defense was "That said defendants at all times after the said storage of said merchandise exercised due care and diligence in and about the storage and safe-keeping thereof; and that, whilst said merchandise remained in storage in said bonded warehouse as aforesaid, the said warehouse was feloniously entered and said cases of merchandise broken open and the contents stolen and carried away by some person or persons unknown, and without any fault or neglect on their behalf."

The following facts were shown by defendants. The segars were stored on the second floor of the warehouse. On the evening of October 24, 1872, the windows, shutters and doors were closed and fastened. In the morning, after the men had opened the warehouse, they found that the cases containing the plaintiff's segars had been opened and the segars taken. They found that on the first floor a window-sash was up and the iron shutters closed, with the bar, in the middle of the shutters, in the usual place, when the shutters are closed; but an iron hook, fixed to the shutters at the bottom, was through the staple, and the staple was drawn from the window-sill. There were no marks on the shutters of their having been forced open. There was no evidence that they could not have been forced open without leaving marks on them, and they were of iron one-half inch thick. At different places at and from the place where the segars had been, and over some bags of nuts piled up, under the opened windows, to the window, were muddy

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Opinion of the Court, by SEDGWICK, J.

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traces of footsteps. In the night before, there were rain and mud in the streets.

The defendants proved that, at the closing of the warehouse in the evening, before the government officer in charge, their foreman and his assistant went through all the floors, to fasten, or see that were fastened, windows, shutters and doors. There was no proof that they looked to see if any person was concealed among the merchandise stored.

The plaintiff claimed that the defendants did not use due care in keeping out strangers or preventing a thief concealing himself in the day time. On this point it was claimed that the jury might have found that sufficient arrangements were not made to prevent persons coming in at the front door without observation, and also that a rear door was left in such a state that strangers might come in without being noticed. This rear door was some forty feet from the office in front. There was an iron bar to fasten it on the inside. When it was shut and fastened by this iron bar, persons on the outside wishing to enter it pulled a bell-pull which rang a bell on the first floor a few feet from the office. Two witnesses for plaintiff swore that they had gone into the warehouse by the front door and through the store without any one seeing them, and had on two occasions seen this rear door open without any one guarding it. It was proved by a preponderance of testimony that in general it was kept shut, or in charge of some employee.

The judge directed a verdict for defendants, and also that the exceptions be heard in the first instance at general term.

*T. C. Campell*, for plaintiff.

*Edgar S. Van Winkle*, for defendants.

BY THE COURT.—SEDGWICK, J.—Under the answer

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Opinion of the Court, by SEDGWICK, J.

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the defendants could only satisfy their liability to plaintiffs by showing that the goods had been stolen without fault on their part. They were not confined to proving that the theft was by some one who had burglariously entered the store. A felonious or burglarious entry was not substantially connected with the defense of stealing, and an allegation of it might be disregarded. But, on the proofs, the defendants were limited to the fact of the larceny having been committed by some one who had concealed himself on the premises before the night of October 23, or who had burglariously entered on that night, and before the morning of the 24th.

If the defendants proved that this theft happened in spite of due care, used by them to prevent such an occurrence, the plaintiff had no cause of action. The learned judge held that they had shown, by the preponderance of testimony, that they had made all the arrangements, and used all the precautions that are made and used by owners ordinarily prudent and intelligent under similar circumstances, and therefore that a verdict for the defendants should be directed. The learned counsel for the plaintiff urges, that arrangements and precautions of this kind can only be learned from actual experience of business and change from time to time, and that though a judge can, from the evidence, say whether a proposition, the elements of which are sworn to before him, is established by the preponderance of proof, he has no special qualification or faculty for ascertaining what are the customs and habits of warehousemen and what devices and safeguards they employ. If he know (by presumption of law) what is done generally by prudent owners to guard their property, then he should always pass upon the question of negligence when there is no dispute as to what was done by a defendant.

Against this, however, it may properly be observed,

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Opinion of the Court, by SEDGWICK, J.

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that there are some means, the fitness of which to protect property may be matter of common knowledge, and it may be taken to be true, that ordinary persons would use only common knowledge; for example, when a theft has been committed by breaking a door, proven to be of thick wood with strong hinges, bolts and bars, a judge could say as well as a jurymen, that such a door was one that persons of common prudence would use. It would be suited to resist a thief, and common prudence would not ask for more. Therefore, in *Coleman v. Livingston* (36 *N. Y. Super. Ct.* 32, afterwards affirmed, without an opinion, 56 *N. Y.* 658) it was decided, that when a burglary had been committed through a scuttle in the roof, the judge should have, on the trial, dismissed the complaint, because the evidence showed that the scuttle was strong and strongly fastened. And in this case we would have to sustain the direction to the jury, if the testimony had been undisputed that the theft had been committed by breaking open from the outside the shutters on the first floor; for those shutters were strong, and strongly secured by bars, hook and staple. This would be the necessary result, at least, if it were held as matter of law, that it was not a question for the jury as to whether it was defendant's duty to have a night-watchman to be an additional safeguard against thieves. On this particular point, there are, I think, two satisfactory considerations. First. If common prudence calls for some watch, the legal presumption should be, that the law has provided in the public watch a sufficient guard against criminals under ordinary circumstances. Second. If the situation of the store and the property is extraordinary, and calls for additional watch, the burden of proof is upon the bailor to show the exceptional state of affairs, and in this case, by the proof, the jury would have been bound to find, that ware-

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housemen, generally, were adequately protected by the police.

These considerations are not conclusive, because the evidence admitted the inference that the theft had been committed by a person who had hidden and been locked in, in the store, on the day before. Then to justify a decision as matter of law, it must appear, conclusively, that the means used to prevent such an occurrence were those used for the purpose by owners of like property in like circumstances.

There might be perhaps a case where it was affirmatively shown that everything was done that could be suggested as proper by the opposite party on the trial, and counsel could not naturally point out a defect in the arrangement. It cannot be supposed that a jury would justly be able to find a defect, and they should not be directed to proceed arbitrarily and to uncertainties.

But in the present case, under the evidence, it cannot be said with certainty that the arrangements, from their intrinsic character, were all that could ordinarily be used or would ordinarily be effective to exclude persons with evil intent, or to discover and expel them after they had gained entrance, and perhaps had concealed themselves. If something more, that was not on its face an extraordinary precaution, could have been done, and would have tended to prevent the particular contingency, it seems to me that a jury alone could say whether, as matter fact, owners of property use such a precaution. Nor, on the facts, in my opinion could a judge say as a matter of law, that what was done was all that ordinary prudence would set up to meet the likelihood of a thief attempting to intrude.

The proof shows that the defendants had in mind the danger, and it may be assumed that owners of property would have it in mind. The risk was that some one would use cunning, trick or imposition to get

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Opinion of the Court, by SEDGWICK, J.

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in and steal, and would craftily elude observation. It must be the law, that ordinary prudence should adapt its care to the particular risk ; and the question on the trial was, had the defendants made arrangements suited not for a general observation and scrutiny of those that would come in with an honest purpose in the ordinary run of events, but suited for the detection of thieves.

I do not mean to say that there was in fact, any particular defect in any part of the defendant's system, nor that the evidence shows any general imprudence nor that the defendants were responsible for the incidental negligence of any of their servants, such as leaving a door open ; but the defendants have responsibility in regard to the general arrangements of their warehouse and business, the number of servants they employ, and the duties and stations they give them, in view of the contingencies of the business. The defendants were conscious of the propriety of seeing that no one came in without a right to enter. The witnesses for the defendants, whose testimony was candid and intelligent, said that there was a constant observation of the persons who came in through the front doors, but there was no specific statement on this point as to the time immediately before the theft. This is not a simple fact that must be taken to be true because honest witnesses swear to it. One or more may make a mistake as to whether the defendant's directions and practice had resulted in or was calculated to result in a continuous observation without a lapse in which strangers might go in at will. Each witness could only speak for himself. There might be a default in his memory, and it was a question of fact whether the manner of conducting business permitted with reasonable certainty a continuous watch at the front doors.

There was a rear door, which the evidence showed was generally shut. Many witnesses proved that they

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Opinion of the Court, by SEDGWICK, J.

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never saw it open, unless it was in charge of somebody. It could not be opened from the outside, after it had been closed. The learned judge in his charge stated that it closed with a spring bolt. The testimony further showed that there was a bar inside, probably used as a defense at night. There was no evidence that this door could not at all times be opened from the inside by any one. The plaintiff gave evidence that at some time not fixed, and on two occasions, this door was open and unguarded. If the defendants had conclusively shown due care (so far as the case was affected by the situation and management of this door), the fact of its having been open on two isolated occasions would have had no particular weight. I do not think they gave conclusive evidence of such care. So far as their servant's negligence in leaving on any particular occasion the door open is concerned, they would not be responsible if they had exercised ordinary care in choosing their workman; although, perhaps, they were bound to make a proper provision against that negligence, which may be accidental in the single instance, but is in a proportion of cases inevitable, on the part of workmen, in a large and hurried business. The door could be opened on the inside, and by persons rightfully in the warehouse, not servants. It was consistent with the full force of defendant's evidence, that it might be so opened, without any arrangement for the observation of such an occurrence. Even if it were at once closed, there was opportunity for a thief to slip in. There was no conclusive evidence that this opportunity could not or did not happen often, and the defendants were bound in their business to make arrangements for what might frequently happen.

It is said that there is no proof that the thief came through this door. Indeed, there was no proof that the thief came through other doors. If the thief were not a servant,—and this was not urged or suggested



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Opinion of the Court, by SEDGWICK, J.

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upon the trial,—it was as likely that a thief would watch and get in by the rear door at a favorable opportunity, as by the front door, where there were more people. The burden was on the defendants to show the loss, and how it happened, and that due care was used against the particular occurrence, or else to show that due care was used as to every way in which it might have happened.

On the whole case, I am of opinion that the plaintiff had a right to go to the jury for their verdict whether the guard was sufficient, which consisted of the observation of the employees, as they were transacting the general business, or whether common prudence called upon defendants to make it the special, if not sole duty of some one to be on the watch. In addition, the jury should have been asked to consider if, under the circumstances in proof, there was any likelihood of a thief being concealed at night; whether the likelihood was of that character that ordinary prudence demanded, at the time of closing, that search should be made for a lurking thief, or that the defendant should have instructed his servants to make regular examination. It may be that the character of the business was such that a thorough search could not be made; and of course that is one of the circumstances which the jury would look at.

For these reasons I consider that the doubt the learned judge entertained, when he directed the exceptions to be heard here, was well founded, and that the exceptions should be sustained, the verdict set aside, and a new trial had, with costs to the plaintiff to abide the event.

SANFORD, J., concurred.

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Statement of the Case.

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JULIUS EINSTEIN, PLAINTIFF AND RESPONDENT,  
v. THOMAS C. CHAPMAN, AS ASSIGNEE OF  
WILLIAM ROTHMAN, AND WILLIAM ROTH-  
MAN, DEFENDANTS AND APPELLANTS.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

ACTION BY A JUDGMENT CREDITOR TO SET ASIDE SAME.

The change of possession required by the statute must be not only actual *but continued*, or it will be presumed fraudulent.

In the case of *Tilson v. Terwilliger*, 56 N. Y. 273, immediate delivery was made and actual possession retained by the purchaser about a year before the property came again into the hands of the vendor to be kept by him for the purchaser. It was held that the possession was *not continued* as required by the statute, and therefore the sale was presumptively void as against a creditor of the vendor.

When it appears, as in this case, that the possession was not continued or retained by the purchaser, the burthen of proof to establish that the assignment was made in good faith and without intent to defraud creditors, rests upon the defendants.

*Held*, that the evidence in this case was insufficient to remove the legal presumption of fraud which arose from the change of possession from the assignee to his assignor, which the statute raises imperatively.

Before SEDGWICK and SANFORD, JJ.

*Decided March 5, 1877.*

This is an appeal from a judgment rendered at special term, March 20, 1876, after a trial of issues of fact before the court without a jury.

The action was brought by the plaintiff, a judgment creditor of the defendant Rothman, upon whose judgment an execution had been duly issued and returned unsatisfied, to set aside an assignment for the benefit

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Statement of the Case.

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of creditors, executed by the judgment debtor to the defendant Chapman, under date of December 23, 1874.

Upon the trial, the plaintiff produced from the files of the office of the clerk of the city and county of New York, and read in evidence such assignment, dated December 23, 1874, and recorded in said county clerk's office, December 30, 1874; also the record of a judgment recovered in the marine court of the city of New York by Einstein, the plaintiff, against Rothman, one of the defendants, January 12, 1875, for \$384.78. The docket of said judgment in the office of the said county clerk, and the due issuing and return unsatisfied of an execution thereon were admitted. The plaintiff then proved by the defendant Rothman, that on and prior to December 23, 1874, he was engaged in business, as a dealer in leather and shoe findings, at No. 130 Canal street, in said city. That up to February 1, 1875, he continued to carry on the business at the same place, making purchases and sales, from time to time, as before, and without changing the signs upon the building otherwise than by adding the letters "Agt." to his name, "William Rothman," on a wooden sign in front. Upon the witness's cross-examination it appeared that for about a week from and after December 29, 1874, the store was closed by Chapman, who had the keys, and that, after January 1, 1875, witness was again put in possession of the store by Chapman, and thereafter carried on the business claiming to act as his agent.

The plaintiff then rested his case. Defendant's counsel moved to dismiss the complaint. The motion was denied, and counsel for defendants excepted.

Evidence was then adduced on the part of the defendants, tending to show that on December 19, 1874, Rothman, being then indebted in the sum of \$2,000 or thereabouts to the firm of Everit & Chapman,

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whereof the defendant Chapman was a member, addressed a note to Chapman dated on that day, advising him that owing to hard times and losses he had been compelled to suspend payment, and that a meeting of his creditors to confer as to a possible settlement of his affairs would be held at the office of his attorneys on the 23rd inst. The meeting was held, and Chapman attended. Ten or twelve out of about nineteen creditors were present, or were represented. It appeared that Rothman's indebtedness was about \$10,000 and his assets about \$3,000. Propositions for a compromise and settlement were then made, and were entertained by some of the creditors present, and an assignment was also proposed and agreed upon. After the execution of the assignment Chapman took the keys, kept the store closed for about a week, and then, at the instance of some of the creditors, who said it would be well for Rothman to go right on, allowed him to go into the premises and carry on the business as before, accounting weekly for all receipts and expenditures.

On February 15, Chapman sold out, at public auction, the entire stock, fixtures, implements, book accounts, and good will of the establishment, in one lot. The property was struck down to one Ahrens, Rothman's father-in-law, for \$725. Chapman received from him that amount, and delivered to him a bill of sale. Rothman continued to carry on the business. It further appeared, that, during the first week in January, 1875, a composition deed, in which were embodied terms and conditions of compromise, which had been proposed and considered at the meeting of creditors, held on December 23, 1874, was signed by the firm of Everit & Chapman, of which firm the defendant, Chapman, was a member, and by all the creditors of Rothman except the plaintiff and one other, who has since released and discharged his claim.

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By the terms of this instrument, which bears date December 31, 1874, the creditors agreed to accept thirty cents on the dollar of their respective claims, in full settlement and satisfaction thereof, payable in two equal installments by the promissory notes of Rothman, indorsed by Frederick Ahrens and John Jahn, at sixty and ninety days respectively, after the date of such agreement. In and by the said instrument, the said creditors covenanted that Rothman might dispose of his property; at his own free will and pleasure, for and towards the payment of said thirty per cent. The paper was signed by Chapman's partner, in the name of Chapman & Everit, and other signatures were obtained by Chapman himself. The notes therein specified were delivered soon after the agreement was signed, and were duly paid. Chapman testified that the assignment papers were delivered to him a day or two after December 29, 1874.

Upon all the evidence, the court found, among other things, that the said assignment was not accompanied by an immediate delivery, followed by an actual and continued change of possession; and that it was not made to appear that said assignment was made in good faith, without any intent to defraud the creditors of said Rothman. Also, that the said assignment was made by Rothman, with intent to hinder, delay, and defraud his creditors, and particularly the plaintiff, and is fraudulent and void.

Judgment was rendered accordingly, and both defendants appealed.

*Nehbras & Pitshke*, for appellant, Chapman.

*Martin S. Meyer*, for appellant, Rothman.

*Bushnell & Albright*, attorneys for respondent;  
*S. Jones*, of counsel.

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Opinion of the Court, by SANFORD, J.

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BY THE COURT.—SANFORD, J.—Defendants' exception to the ruling of the court, in refusing to dismiss the complaint at the close of the testimony on the part of the plaintiff, was not well taken. If an immediate delivery of the assigned property, and an actual change of its possession can be inferred from the facts that, upon the execution and delivery of the assignment, the keys passed into the possession of the assignee, and the store was closed for about a week thereafter, it nevertheless appears that the assignor, except during that period, continued to carry on the business, after the assignment, making purchases and sales, as before, without other outward and visible indications of a change of ownership, than the mere addition of the letters "Agt." to his name, upon one of the signs in front of the building.

This evidence was sufficient, under numerous decisions of this court, to justify a finding that the alleged transfer was not accompanied by an immediate delivery and followed by an actual and continued change of possession, and was, by virtue of the statute (2 R. S. 136), therefore, presumptively fraudulent against the creditors of the assignor (*Randall v. Parker*, 3 *Sandf.* 69; *Topping v. Lynch*, 2 *Robt.* 484; *McCarthy v. McQuade*, 1 *Sweeny*, 387). The change of possession, required by the statute, must be not only actual, but *continued*, or it will be presumed fraudulent. In *Tilson v. Terwilliger*, 56 *N. Y.* 273, immediate delivery was made and actual possession was retained by the plaintiff, for about a year after his alleged purchase, but the property was then returned by him to the possession of his vendor, to be kept for him, as he testified; but the court held that, notwithstanding such immediate delivery and actual change of possession, and although much time elapsed before the chattel came again to the hands of the vendor, the change of possession was not *continued*, according to

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Opinion of the Court, by SANFORD, J.

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the statutory requirement, and the sale was, therefore, presumptively void, as against a creditor of the vendor.

Under these authorities, we think the defendant's motion for a dismissal of the complaint was properly denied.

The evidence for the defense not only confirmed and corroborated that advanced on behalf of the plaintiff, with respect to the brief continuance of any change of possession, but tended strongly to show that such change, if any, actual or constructive, was merely colorable, and not made in good faith. Of course, if the ruling above considered was correct, the burthen of proof was upon the defendants to make it appear that the assignment was made in good faith and without intent to defraud (2 R. S. 136). The evidence offered by the defense failed to satisfy the court in this regard, and the result was a finding of fact adverse to the *bona fides* of the transaction.

We have carefully examined the evidence bearing upon this question, and deem it insufficient to outweigh the legal presumption of fraud, which the statute renders imperative. Without attempting to analyze it minutely, it may be said that it tends to induce the belief, that the assignment in question was but part of a collusive scheme to coerce a compromise between an insolvent debtor and certain of his creditors whose assent to a composition could not readily be procured; that it was not made for the purpose of realizing upon the assets, and converting them into money for distribution among creditors generally, but that it was intended to cover and screen the debtor's continued possession of the assigned estate, during the period requisite for the successful negotiation and consummation of the compromise proposed.

On the whole case, we think the material findings of fact are sustained by the evidence, and that the

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conclusions of law, upon which the judgment was rendered, were properly deduced therefrom.

The judgment must, therefore, be affirmed, with costs of the appeal.

SEDGWICK, J., concurred.

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JOHN W. PARKER, PLAINTIFF AND APPELLANT,  
v. JOHN G. HARRISON, *et al.*, DEFENDANTS  
AND RESPONDENTS.

ACTION IN THE NATURE OF A CREDITOR'S BILL.

PROPERTY HELD IN TRUST FOR THE DEFENDANT.

*Where such trust has been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself, it cannot be reached and applied in payment of the judgment.*

The legislature has defined the cases and prescribed the manner in which, after the return of an execution unsatisfied against the property of a judgment creditor, satisfaction may be decreed out of property or things in action belonging to or held in trust for him, and that all the power of the courts in the premises is derived from, and is limited by legislation (*Campbell v. Foster*, 35 N. Y. 361).

The article of the Revised Statutes, relative to the general powers, duties, and jurisdiction of the court of chancery (2 R. S. 278), prescribe the limitations within which the satisfaction of judgments out of property held in trust for a judgment debtor, can be decreed in a creditor's suit; and sections 38 and 39 (2 R. S. 274) were construed as excepting property held in trust for the debtor, *where the trust has been created by, and the fund so held in trust has proceeded from some person other than the debtor himself* (*Campbell v. Foster*, 35 N. Y. 361).

While the income derived from the money held in trust remains in the possession of the trustee, it is applicable,



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*solely and exclusively*, to the purposes of the trust, and it cannot be treated otherwise by the trustee, the *cestui que trust*, or his creditor.

The relation of trustee and *cestui que trust*, must be terminated by the fulfillment thereof, and the money ceased to be held in trust and become absolutely and unqualifiedly the property of the judgment debtor by delivery to him, and the trustee discharged from all responsibility in regard to the same before it shall be liable for the debts of the *cestui que trust*, the judgment debtor.

Before CURTIS, Ch. J., SANFORD and FREEDMAN, JJ.

*Decided March 5, 1877.*

Appeal by the plaintiff from a judgment in favor of the defendants, dismissing the complaint and dissolving an injunction granted *pendente lite* without costs.

This action, in the nature of a creditor's bill, was brought by the plaintiff, a judgment creditor of the defendant John G. Harrison, upon whose judgment an execution had been duly issued and returned unsatisfied, to reach property of the judgment debtor, viz., money amounting to more than \$1,000, alleged to be in the possession of the defendant Henry Harrison.

A preliminary injunction was granted restraining the defendant Henry Harrison, *pendente lite*, from paying away any money in his possession belonging to the said John G. Harrison, to the extent of \$1,000.

The cause was tried at special term without a jury, December 20, 1875. It appeared upon the trial, and the court found among other things, that by last will and testament, duly proved before the surrogate of the county of New York, James Harrison, late of the city of New York, deceased, father of the defendant John G. Harrison, gave and devised to trustees therein named, all his property (remaining after the payment

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of his debts) in trust to pay the whole income thereof after the death of his widow, to his children in equal shares during their respective lives. The widow died in February, 1862. Prior to June 3, 1862, by an order of the supreme court, the defendant Henry Harrison was duly appointed sole trustee under said will, and duly qualified as such. As such trustee, he received and now holds the share of said testator's estate to the income of which the defendant John G. Harrison is entitled as one of the *cestuis que trust* under said will. Such income amounts to about \$5,000 per annum. At the date of the commencement of this action there remained in the hands of the defendant Henry Harrison, of the income which had arisen under the said trust in favor of the defendant John G. Harrison, the sum of \$1,069, of which \$1,000 was the balance of his share of said income for the quarter ending December 31, 1874, and \$69 thereof a balance of such income for the quarter ending March 31, 1875.

It did not appear that any accounting had been had between the defendants as trustee and *cestui que trust*, nor that the amount of income in the hands of the trustee to which the *cestui que trust* was entitled, had been adjusted and settled between them; nor was any express promise by Henry Harrison to pay to John G. Harrison any certain sum proven.

It was admitted, and the court further found that the plaintiff's judgment was recovered as alleged in the complaint, viz., on March 9, 1875, for \$696.45, and that execution thereon had been duly issued and returned unsatisfied.

Upon these facts judgment was rendered in favor of the defendants, and from such judgment the plaintiff now appeals.

A. W. Knapp, for appellant.

B. F. Dunning, for respondents.

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Opinion of the Court, by SANFORD, J.

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BY THE COURT.—SANFORD, J.—There is no allegation in the complaint, nor was any proof offered at the trial to the effect that the income and profits of the property given and devised by the testator in trust for the benefit of the defendant John G. Harrison exceeds the sum necessary for his suitable maintenance and support. That question is not in the case. No such issue was made, and none such has been litigated. It cannot, therefore, now be claimed that the provision of section 57 of the statute of Uses and Trusts (1 *R. S.* 729), which subjects the surplus of rents and profits, accruing from lands held in trust, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, to liability in equity, for the claims of the creditors of such person, has any bearing upon the determination of the present appeal.

The case, therefore, presents the naked question whether, irrespective of the provisions of the statute above cited, the accrued income of the fund held in trust for the benefit of the judgment debtor, John G. Harrison, under the residuary clause contained in his father's will, can be reached by a suit of this character and subjected to the payment of his debts. The case of *Campbell v. Foster* (35 *N. Y.* 361), seems to be directly in point. It was there held that the legislature has defined the cases and prescribed the manner in which, after the return of an execution unsatisfied against the property of a judgment debtor, satisfaction may be decreed out of property or things in action belonging to or held in trust for him, and that all the power which the courts now possess to subject such property to the payment of judgments is derived from and is limited by legislation. The article of the Revised Statutes relative to the general powers, duties and jurisdiction of the court of chancery (2 *R. S.* 273), was held to prescribe the limitations within which the

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Opinion of the Court, by SANFORD, J.

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satisfaction of judgments out of property held in trust for a judgment debtor, can be decreed in a creditor's suit; and the provisions of that article, as contained in sections 38 and 39 (2 R. S. 274), were construed as excepting from the operation of a judgment in such a suit property held in trust for the debtor, where the trust has been created by, and the fund so held in trust has proceeded from some person other than the debtor himself. In that case, as in this, the trust was created by, and the fund held in trust proceeded from the father of the defendant, the judgment debtor. The beneficial interest of the *cestui que trust* in the income of the fund placed in trust by her father for her support and maintenance during her life, was held to be beyond the reach of a creditor's bill, and the sections of the statute above referred to were construed as excluding and exempting the case from that statutory remedy.

It was strenuously urged upon the argument, that inasmuch as the purpose of this suit was not to anticipate accruing income, but to reach income actually accrued when the suit was commenced, the case was distinguishable from that of *Campbell v. Foster*. No such distinction was suggested or recognized in the opinion there rendered. It is true that the bill in that case, did not in terms, allege that there remained in the hands of the trustees at the time of filing it, or at the time of the plaintiff's appointment as receiver, any portion of the income derived from the trust fund, but judgment was demanded, that out of the income derived, or thereafter to be derived from the trust fund, there be paid by the trustees a sum sufficient to satisfy the judgment against the *cestui que trust*. The principle established by that case is equally applicable to accrued and accruing income, and the reasoning upon which the decision was based seems to be equally conclusive as respects both. In the dissenting

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Opinion of the Court, by SANFORD, J.

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opinion of Judge Denio, in *Graff v. Bonnett* (31 N. Y. 9), the position was taken that the exceptional clause of the statute was intended by the legislature to protect the fund itself, and not the income derived from it, from the pursuit of creditors, when such fund had proceeded from some person other than the debtor himself. The opinion of the court in *Campbell v. Foster* distinctly repudiated this position as purely conjectural, and held the income irrespective of its amount, of its superfluity, or of the question whether or not it had already accrued as money held in trust for the debtor under a trust created by a person other than himself; and, therefore, as excluded and exempt from liability by virtue of the express exception stated in the statute.

While the income remains in the hands of the trustee it is applicable solely and exclusively to the purposes of the trust. Its application to such purposes can be enforced in equity by the *cestui que trust*; it cannot be treated by him, or by his creditors otherwise than as subject to the trust. Certainly, until there has been an accounting and settlement between him and the trustee, or some action taken between them, the effect of which is to discharge the trustee from liability as such, to terminate the relation of trustee and *cestui que trust*, and to substitute in its stead that merely of debtor and creditor as respects the money sought to be reached, that money cannot be deemed withdrawn from the operation and effect of the trust, and cannot, therefore, be impounded. The trustee cannot discharge himself from the obligation of the trust otherwise than by its performance. The mere fact that he has kept an account of all his dealings with the *cestui que trust*, and that such account shows a balance in his hands, in no wise relieves him from his accountability as trustee, or changes the nature of the title whereby he holds such balance. It is still money held in trust, and under the

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authority of *Campbell v. Foster*, is beyond the reach of the creditors of the beneficiary for whom it is held. The ruling in that case seems to have been reluctantly but unhesitatingly followed in *Hann v. Van Voorhis*, (5 *Hun*, 425). I concur with the learned justice before whom the trial was had at special term, in the opinion that "nothing immoral, unjust or in fraud of the plaintiff" can be imputed to the law in sanctioning, enforcing and protecting such a trust. All that can rightfully be demanded by a creditor is that when the *jus disponendi* lawfully exercised by the original owner of the fund has been fully carried into effect, when the trust has been executed, when the money has ceased to be held in trust and has become absolutely the property of the debtor, it shall be liable for his debts.

The judgment must be affirmed with costs of the appeal.

CURTIS, Ch. J., and FREEDMAN, J., concurred.

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LESLEY E. WESTON, PLAINTIFF AND RESPOND-  
ENT, v. THE NEW YORK ELEVATED  
RAILROAD COMPANY, DEFENDANT AND  
APPELLANT.

RAILROAD CORPORATIONS AS CARRIERS OF PASSENGERS  
FOR HIRE.

THEIR RESPONSIBILITY AND CARE IN KEEPING THEIR FLOORS  
AND PLATFORMS IN A SAFE AND PROPER CONDITION, FOR THE  
ENTRANCE AND EGRESS OF PASSENGERS, INTO AND FROM  
THEIR CARS.

*They are responsible for something more than ordinary care.*

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*They are bound to use all such reasonable precautions against injury, as human sagacity and foresight can suggest.*

Passengers have a right to assume that if they proceed with ordinary care over platforms and through passages leading to and from their seats in the train, that they may do so without risk of injury to life or limb from an unsubstantial, insecure or treacherous foothold (*Hurlburt v. New York Central & Hudson River R. R. Co.*, 40 *N. Y.* 145; *McDonald v. Chicago & North Western R. R. Co.*, 56 *Iowa*, 124).

As in the case at bar, they are bound to be on the alert during cold weather to see whether there is ice upon the platform, and to remove it or make it safe by sanding it, or putting ashes upon it, or in some other manner. The degree of care requisite for safety varies with the exigencies of the case, and it is no error to assert that a more watchful scrutiny and care should be exacted and bestowed in winter than in summer in the protection of steps, landings and platforms from dangerous accumulations of ice and snow.

**NEW TRIAL.**

**MOTION FOR, ON THE GROUND OF NEWLY DISCOVERED EVIDENCE.**

Facts within the knowledge of the conductor of the train upon which an accident occurs, may properly be deemed within the knowledge of the company.

The fact that the defendant's superintendent failed to inform himself of such facts by inquiry of the conductor, affords no ground for ordering a new trial, especially where, as in this case, the conductor was known to the defendant's counsel to be a material witness for the defense. Ordinary diligence on the part of the defendants would have informed them of all the facts within the knowledge of the conductor, and the omission to interrogate him fully was wholly inexcusable.

In applications of this character (which are not regarded with favor), the applicant must show that he has done all in his power in acts tending to discover the testimony, and that the failure was not owing to any delinquency on his part. "If the least fault be imputable to him, he will ask for relief in vain" (3 *Graham & Waterman*, 1026).

Before CURTIS, Ch. J., SANFORD and FREEDMAN, JJ.

*Decided March 5, 1877.*

Statement of the Case.

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Appeal by defendant from a judgment for \$9,142.30, entered upon a verdict in favor of plaintiff; also, from an order denying defendant's motion for a new trial made on the minutes of the court; also, from an order made at special term, after judgment, denying defendant's motion for a new trial on the ground of newly discovered evidence.

The action was brought to recover damages for personal injuries sustained by the plaintiff, through the alleged negligence of the defendants, who are common carriers of passengers for hire.

On the afternoon of February 3, 1873, the plaintiff, with other passengers, crossed the platform extending from defendant's waiting room to the track of their railroad, in order to enter a train then about to depart from one of their stations. It had been snowing during the day and the night previous. The platform was in an icy, snowy, slippery condition. The plaintiff slipped upon the ice, fell, and sustained serious injuries, from which it is improbable that he can ever entirely recover.

At the close of the plaintiff's case, the defendants moved to dismiss the complaint, on the ground that the evidence failed to show negligence on their part, and tended to establish want of due care on the part of the plaintiff. The motion was denied. It was renewed at the close of defendant's evidence, and again denied.

The court charged the jury, among other things, that "the defendants were bound to be on the alert during cold weather, and to see whether there was ice upon the platform, and to remove it, or make it safe by sanding it, or putting ashes upon it, or in some other manner; and that the omission to do so, or something equivalent, was negligence." Also, "that the defendants were bound under the circumstances of this case,



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Opinion of the Court, by SANFORD, J.

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to keep the platform free from snow and ice, or from being slippery, . . . so as to allow passengers to go upon it in safety." Exception was taken by the defendants to these portions of the charge.

The jury rendered a verdict for \$9,000 in favor of the plaintiff.

The court declined to set aside the verdict as against the weight of evidence or as excessive, and the defendant's motion upon the minutes, for a new trial on these grounds, was denied.

After judgment, the defendants applied at special term for a new trial, upon affidavits tending to show that the conductor, who had charge of the train, and who witnessed the accident, but who was not called as a witness at the trial, could testify to material facts not within the knowledge of defendant's superintendent at the time of the trial. The newly discovered evidence was to the effect that the plaintiff fell on the steps leading from the waiting-room to the platform; that there was no snow or ice upon those steps, and that he afterwards admitted that the company was not to blame. Several affidavits were read in opposition, contradicting the conductor, and showing that the trial had been once postponed in order to enable the defendants to secure his attendance or procure his deposition, and that they finally proceeded to trial voluntarily in his absence, without applying for a further postponement, and without attempting to take his deposition under commission or otherwise.

*Tracy, Olmstead & Tracy*, attorneys for appellant;  
*Charles Tracy*, of counsel.

*Royal S. Crane*, attorney, for respondent; *I. T. Williams*, of counsel.

BY THE COURT.—SANFORD, J.—This case appears to have been submitted to the jury upon the issues of

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Opinion of the Court, by SANFORD, J.

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fact presented by the pleadings under proper instructions from the court, and I see no reason to interfere with the verdict, either as against the weight of evidence, or on the ground of excessive damages. The jury were in effect instructed that the burthen of proof was upon the plaintiff, and that in order to recover he was bound to satisfy them by a preponderance of credible testimony that the defendants were guilty of negligence, whereby his injuries were occasioned, and that no negligence on his part contributed thereto; that on the other hand, an absolute duty devolved upon him to exercise all his faculties against suffering injury from facts of which he had notice; and that, under the circumstances, it was a question of fact for them to say, whether he "was using ordinary prudence in proceeding as he did on the platform as he described it, slippery to the extent that it was, in the midst of such disturbance as he described."

The court further charged, in compliance with the request of defendants' counsel, that the defendants were not bound to keep their platform in such a condition that it would be impossible for a passenger to slip thereon; but in such condition, that persons using the ordinary care that people do use when they are not apprised of danger, would not have slipped. That the plaintiff was negligent, if, having seen that there was snow and ice on the platform on which others slipped, he did not exercise greater care and caution than he would have used if he did not know that there was snow or ice, and that the notice he had of danger called upon him to use special precautions against slipping.

These instructions are as favorable to the defendants as they well could be, consistently with the established rules of law applicable to cases of negligence. Railroad corporations, as carriers of passengers for hire, are responsible for something more than mere ordinary care in keeping their floors and plat-

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Opinion of the Court, by SANFORD, J.

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forms in a safe and proper condition for the entrance and egress of passengers into and out of their cars. They are bound to use all such reasonable precautions against injury as human sagacity and foresight can suggest; and their passengers have a right to expect and to assume that in proceeding with ordinary care over platforms, and through passages leading to and from their seats in the train, they may do so without risk of injury to life or limb from an unsubstantial, insecure or treacherous foothold (*Hurlburt v. N. Y. Central R. R. Co.*, 40 *N. Y.* 145; *McDonald v. Chicago & N. W. R. R. Co.*, 56 *Iowa*, 124).

It is not stating the responsibility of carriers of passengers for hire too strongly in this regard to declare that they are bound "to be on the alert during cold weather, to see whether there is ice upon the platform, and to remove it, or make it safe by sanding it, or putting ashes upon it, or in some other manner." The degree of care requisite for securing safety varies with the exigencies of the case, and it is no error to assert that a more watchful scrutiny should be exacted and bestowed in winter than in summer in protecting steps, landings and platforms from dangerous accumulations of snow and ice. Indeed, the evidence in this case shows that the defendants recognized this very obligation, for one of their witnesses testified that he always did his best to try and keep the platform free from snow. That he generally took ashes or sand, and shook it on the platform, and on the steps leading in and out of the door. That he took a broom, and swept the snow off; and a mop, and mopped it afterwards, "which," he adds "was my duty to do." In exacting from their employees a more stringent observance of the precautions requisite for securing the safety and comfort of their passengers than their counsel deems strictly obligatory, we think the defendants but conformed to the requirements of law, and in no wise

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Opinion of the Court, by SANFORD, J.

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exceeded their responsibility to the public. It was for the jury to determine, on all the evidence, whether such precautions were in fact observed or omitted.

The exceptions taken at the trial to certain rulings of the court in rejecting evidence have been considered, and are not deemed tenable.

The motion for a new trial on the ground of newly discovered evidence was properly denied. The existence of this evidence alleged to have been newly discovered, could readily have been ascertained by the defendants prior to the trial, had proper diligence to that end been employed. Indeed, facts within the knowledge of the conductor in charge of the train upon which an accident occurs, may properly be deemed to be within the knowledge of the company running the train. That the defendants' superintendent failed to inform himself of such facts by inquiry of the conductor, affords no ground for ordering a new trial; especially where, as in the present case, no effort seems to have been made to secure the attendance or obtain the deposition of the conductor, who might well have been presumed, and was, in fact, known to defendants' counsel to be a material witness for the defense.

Ordinary diligence on the part of the defendants would have elicited from their conductor all the facts within his knowledge pertinent to the controversy, and the omission to interrogate him fully, and to procure his testimony, is wholly inexcusable. Applications of this character are addressed to the discretion of the court, and are regarded with disfavor. The applicant must show that he has done all in his power, and that failure to discover the testimony was owing to no delinquency on his part. "If the least fault be imputable to him he will ask for relief in vain" (3 *Graham & Waterman*, 1026).

I am of opinion that the newly discovered evidence

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Statement of the Case.

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in question would not, if adduced at the trial, have materially affected the result. It is not of sufficient weight to authorize a new trial.

The judgment and orders appealed from should be affirmed with costs.

CURTIS, Ch. J., and FREEDMAN, J., concurred

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ARTHUR T. WHITE, PLAINTIFF AND APPELLANT,  
v. LEWIS MEALIO, *et al.*, DEFENDANTS AND  
RESPONDENTS.

LEASE.

RESERVATION OF THE RIGHT OF ENTRY UPON THE PREMISES BY THE  
LANDLORD TO MAKE REPAIRS, &c.

*Consideration for a promise of the landlord to pay tenant for damages caused by an entry and holding of the premises to secure the same against excavations being made on adjoining lot.*

In this case the plaintiff was a tenant of defendants, and held under a lease which reserved to the landlord the right of entering the premises "at reasonable hours in the day time to examine, &c., and to make such alterations and repairs therein as shall be necessary for the preservation thereof or of the building."

The defendant agreed to allow plaintiff one quarter's rent if he would permit needles to be inserted and remain in the walls of the premises for two weeks, in order to shore up or secure the building against the danger of excavations being made upon adjoining premises, and if they remained more than two weeks the defendant agreed "to make it right" with plaintiff. The needles remained for a period of about eight weeks, to plaintiff's injury, &c. *Held*, that the defendant was liable on his promise for the injuries committed and damages sustained, notwithstanding the conditions in the lease, and there was ample consideration for the promise.

Evidence tending to contradict the facts in the case as claimed and proved by the plaintiff, makes a case for

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Opinion of the Court, by SANFORD, J.

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submission to the jury, and a dismissal of the complaint is error.

Before SEDGWICK and SANFORD, JJ.

*Decided March 5, 1877.*

Appeal from a judgment in favor of defendants for \$465.95 costs entered upon the dismissal of the plaintiff's complaint.

This case has been twice tried. On the first trial, the complaint was dismissed at the close of the evidence on behalf of the plaintiff. Exceptions then taken were heard in the first instance, as ordered, at general term, and were overruled. The court of appeals reversed the judgment thereupon entered in defendant's favor, and directed a new trial. On the second trial, a motion for dismissal, made at the close of plaintiff's case, was denied; but, after testimony had been taken on behalf of the defendants, such motion was renewed, and was granted. Judgment was thereupon entered in favor of the defendants for their costs, and from that judgment the plaintiff now appeals.

*S. Jones*, for appellant.

*E. T. Brown*, for respondent.

BY THE COURT. — SANFORD, J. — This action was brought for the recovery of damages alleged to have been sustained by the plaintiff by reason of defendants' breach of an agreement to compensate him for an injury to his business, occasioned by their running needles through the walls of the premises occupied by him, in order to shore up the building while excavations were making upon adjoining premises. The plaintiff was a tenant of defendants', and held the premises occupied by him under a lease from them which reserved to the landlord or his agent, the right of entering the premises

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Opinion of the Court, by SANFORD, J.

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“at reasonable hours in the day-time, to examine or to make such alterations and repairs therein as shall be necessary for the preservation thereof, or of the building.” The complaint alleged that before the insertion of such needles, the defendants agreed to allow the plaintiff one quarter’s rent with the understanding that the needles were not to remain more than two weeks; but that defendants wrongfully allowed them to remain for nearly eight weeks, against the plaintiff’s will, and to the injury of his business.

Upon the trial, the plaintiff testified that upon being notified by the persons who were about to commence the work that such needles were to be inserted, he refused to permit them to be put in until he saw Mr. Mealio, (one of the defendants). That he went with the foreman who had thus notified him to Mr. Lewis Mealio, and objected to the introduction of the needles as they would inconvenience him a good deal; that, on being asked by Mealio what he wanted, he said he wanted some equivalent, because they would upset him in his business; that Mealio then asked the foreman how long the needles would be in; that the foreman replied, about two weeks; that Mealio again asked what he wanted, and that he thereupon demanded \$100; that, after some conversation as to the amount of rent he was paying, viz., \$350 per annum, Mealio said, “I will give you a quarter’s rent, and, if it is any longer than the two weeks, I will make it right with you.” That, under that condition, he let the men come in with the needles. They came in on February 17 or 18, and remained till April 8, 1867, materially obstructing him in his trade during the whole period.

The testimony on the first trial was substantially to the same effect.

The court of appeals held that this evidence established the liability of the defendants for the injuries

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Opinion of the Court, by SANFORD, J.

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committed, and made out a *prima facie* case against them, notwithstanding the lease; and that, in the absence of evidence tending to show that the alterations were necessary to the preservation of the building, and that the time employed was not unreasonable, the lease constituted no justification. It further held that, *without regard to this question*, the plaintiffs were entitled to recover under defendants' agreement to pay them a certain amount for the damages sustained; that there was adequate consideration to support the defendants' promise in the plaintiff's claim, to which the defendants assented, of a right to exclude them from inserting the needles, and having his premises exposed day and night, while the lease only authorized repairs in the day-time.

At the second trial, the defendants gave evidence in contradiction of the plaintiff's testimony as to the alleged agreement, and also proved, without contradiction, that they were not the owners of the building, but merely lessees thereof; and that the men who inserted the needles were not employed or paid by them, but by their landlord; and that the work done was necessary for the preservation of the building.

But Lewis Mealio testified that, when the plaintiff complained of the inconvenience to which the insertion of the needles would subject him, and was captious about it, he said in reply that "if we did not put these things in, we would be liable to the landlord for any damages done to his building," and the foreman, who was present when the interview between the plaintiff and Mealio occurred, in which the alleged agreement was made, if at all, but who did not hear what passed between them, states that after they had talked together Mealio said to him, "go on and put in the needles;" that it was "all right."

There is, therefore, evidence tending to show that the work was done by defendants' direction, under an

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Opinion of the Court, by SANFORD, J.

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agreement between them and the plaintiff that compensation should be made to the latter for the inconvenience to him thereby occasioned. The agreement, indeed, is not denied in the answer, and the decision of the court of appeals is to the effect that there was ample consideration to support it. Such evidence sustains the allegations of the complaint, and the only effect of testimony in contradiction is to require the submission of the disputed points to the jury. The plaintiff allowed such testimony to come in without objection, notwithstanding the implied admission of the answer, and only asked that the jury might be allowed to pass upon this question, and upon all the questions in the case.

The court refused to permit the case to go to the jury, except upon the question "whether the needles were permitted to remain an unreasonable length of time." The submission of that question, alone, involved a determination by the court of defendants' liability only in case of unreasonable delay on their part in removing the needles; but, if the agreement was made as alleged, and was valid, the plaintiff was entitled to recover under it "what was right," whether the needles remained for an unreasonable length of time or not, and the amount of his just and reasonable compensation was a question for the jury.

If the agreement was not made as alleged, the pleadings presented the issue whether the injuries complained of were committed by the defendants; if so, whether, in committing them, they exceeded their rights as reserved by the lease; and, finally, in such case, what amount would be adequate as indemnity to the plaintiff. Upon all of these questions there was conflicting evidence. The refusal, therefore, to submit the case to the jury upon any other question than that specified by the court, and the dismissal of the complaint upon the plaintiff's declining to have that

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Opinion of the Court, by SANFORD, J.

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question alone submitted, and after his request to be allowed to go to the jury upon the whole case and on all the questions involved, including the question whether there was an agreement between Mealio and the plaintiff, constituted error for which a new trial should be granted. It involved a determination adverse to the plaintiff, of the question as to the making of such agreement; whereas, under the omission from the answer of any denial of the making thereof, the least that the plaintiff could ask was that the conflicting evidence on the subject should be passed upon by the jury. The defendant's counsel urges that the agreement, if made, was void for lack of consideration, and it would seem that the ruling of the court below was based upon that assumption. But the court of appeals, as I have already intimated, seems to have adopted the opposite view, and to have held the consideration sufficient, and the defendants' promise binding, if made.

Were the question an open one, I think it sufficiently appears from the evidence that the defendants had a direct interest in having the building shored up and the needles inserted; that the plaintiff strenuously objected, claiming that they would interfere with his business, and that he had the right to exclude them; that the defendants, by negotiating and contracting with him, acknowledged that there was color for his objection; and I am of opinion that, under those circumstances, his concession of the privilege constituted an adequate consideration for their promise to compensate and indemnify him for the inconvenience thus occasioned.

The judgment must be reversed and a new trial ordered with costs to the appellant to abide the event.

SEDGWICK, J., concurred.

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Statement of the Case.

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HANNAH M. CARTER, PLAINTIFF AND RESPOND-  
ENT, v. DANIEL S. YOUNGS AND JENNIE  
YOUNGS, DEFENDANTS AND APPELLANTS.

SUBSTITUTED SERVICE OF SUMMONS AND COMPLAINT, UNDER THE  
ACT TO FACILITATE THE SERVICE OF PROCESS IN CERTAIN CASES.  
*Session Laws of 1853.*

This act is applicable to cases in which the defendant, if a resident of the State, *cannot be found* after proper and diligent effort to effect service upon him, *or*, to cases in which, *if found*, he avoids or evades such service. These provisions are in the alternative form, and are not coupled conjunctively; if, therefore, it sufficiently appeared by the affidavit upon which the order was made, that the defendant *could not be found* (no question being raised as to the earnestness or diligence of the effort to find him) the order was properly granted.

The word *found*, as used in the statute, is the equivalent of the Latin word *invenitus*. The primary definition of the verb *to find*, is *to come to, to meet*, and hence *to reach, to attain to, to arrive at*.

It appears by the affidavit upon which the order was granted in the case at bar, that the officer charged with the service of the summons, was unable *to reach or get at* the defendant so as to serve him personally, and such inability afforded sufficient grounds for a resort to other service, which this statute provides in cases where the defendant cannot be found, even although the defendant did not attempt to evade or avoid personal service.

Although the order appears to have been made on the ground of an evasion or avoidance of service, it was not irregularly or improvidently granted. The question is, does the law authorize the act upon the facts appearing in the case, namely, *that the defendant could not be found by the officer*.

Jurisdiction does not depend upon the intention of the officer or tribunal undertaking to act, but upon the facts upon which they act.

Ch. J. CURTIS, in an opinion that concurs in the result, holds that under the facts in the case, the defendant, through his

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Opinion of the Court, by SANFORD, J.

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wife as his agent, or acting for him in the premises at the time, declined or avoided the service, and the order for substituted service was authorized thereby.

Before CURTIS, Ch. J., and SANFORD and FREEDMAN, JJ.

*Decided March 5, 1877.*

Appeal from an order denying defendant's motion to set aside an order made for a substituted service of the summons and complaint on the defendant Daniel S. Youngs.

The summons and complaint were served, on March 27, on the defendant Mrs. Youngs, at the residence of the defendants, by a deputy sheriff. She informed him that her husband was ill within the house, and declined to give him permission to see him or to serve him. The officer in his affidavit stated he was unable for these reasons to make such service, and an order was made for a substituted service. The affidavits to vacate the order for a substituted service show that at the time the defendant Daniel S. Youngs was ill in the house, and that a personal service, by disturbing and exciting him, would probably have been detrimental to him.

*Luther R. Marsh*, for appellants.

*George W. Lord*, for respondent.

BY THE COURT.—SANFORD, J.—The “Act to facilitate the service of process in certain cases” (*Laws of 1853, ch. 511*), materially enlarges the power of courts and judges to dispense with the necessity of personal service; and, without directly amending the Code, in terms, greatly modifies its provisions with respect to the manner in which the service of a summons may be made. Under subdivision 2 of section 135 of the Code,

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Opinion of the Court, by SANFORD, J.

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service by publication can only be made when it appears by affidavit to the satisfaction of the court not only that the person upon whom service is to be made *cannot*, after due diligence, *be found* within the State. but also, if he be a resident of the State, that he has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent. Satisfactory proof must be furnished, as well of such departure or concealment, and with the intent aforesaid, as of the fact that the person upon whom service is to be made *cannot be found*.

In *Towsley v. McDonald* (32 *Barb.* 604), a judgment rendered upon service by publication was held void for want of jurisdiction, because the affidavits on which the order of publication was made failed to show an intent to defraud creditors or to avoid the service of a summons, although it sufficiently appeared that the defendant was a resident of the State, and could not be found therein, but had either departed therefrom or kept himself concealed. And in that case the court refused to infer an intent to avoid service from the fact of departure or concealment, in the absence of proof that a suit was threatened, expected or feared.

In *Van Rensselaer v. Dunbar* (4 *How. Pr.* 151), an order for publication was refused, where the officer who had the summons saw and pursued the defendant, but failed to effect service, by reason of the superior fleetness of defendant's horse. It was remarked in that case, that if the statute had only required, generally, that the defendant *could not be found* within the State, and the sheriff had returned *non est inventus*, that might have been sufficient; as it is said that a return *non est inventus* is good, even if the plaintiff know where to find defendant. But inasmuch as the defendant, although not to be *found*, could not also be said to have concealed himself with intent to avoid the ser-

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Opinion of the Court, by SANFORD, J.

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vice of a summons, it was held that the case was not brought within the statute, and the application was denied.

The act of 1853, authorizing substituted service, is applicable either to cases in which the defendant, if a resident of the State, *cannot be found*, after proper and diligent effort to effect service upon him, *or* to cases in which, if found, he avoids or evades such service. The provisions of the act are in the alternative form. They are not coupled conjunctively, as is the case in the Code. If, therefore, it sufficiently appeared by the affidavit upon which the order was made, that the defendant Daniel S. Youngs *could not be found*, no question being made as to the earnestness and diligence of the effort to find him, the order was properly granted, and the motion to vacate it was properly denied.

I think the word *found* is used in the statute in its technical sense, as the equivalent of the Latin word *inventus*, which has long been employed in legal practice. Indeed, the two words are synonymous, as well in their general as in their technical use. "To find," says WEBSTER, "coincides in origin with *venio*, but in sense with *invenio*." And the literal signification of *invenio* is to come upon, to get at. The primary definition of to find, as given by WEBSTER, is to come to, to meet; and hence, *to reach*, to attain to, to arrive at. It appears by the affidavit upon which the order now in question was made, that the deputy charged with the service of the summons in this suit was quite unable to reach or get at the defendant so as to serve him personally; and such inability afforded sufficient warrant for resorting to the remedy which the statute affords in cases where the defendant *cannot be found*, even although no attempt may have been made by the defendant to avoid or evade such service. For this reason, I am of opinion that the order for substituted

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Concurring opinion of CURTIS, Ch. J.

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service was not irregularly or improvidently granted, notwithstanding it appears on its face to have been made on the ground of an avoidance or evasion of service, and not upon the ground above considered. Every intendment is in favor of the jurisdiction; and "jurisdiction does not depend upon the intention of the officer or tribunal undertaking to act. The question is, Does the law authorize the act?" (Snyder v. Plass, 28 N. Y. 465).

I cannot assent to the proposition that the affidavit shows either an avoidance or evasion of service on the part of Mr. Youngs, since there is no proof whatever that he suspected or believed, or had reason to suppose that a suit was about to be instituted against him, or that process or papers were about to be served. But inasmuch as it appeared that he could not by proper and diligent effort be *found*, and personal service could not, for that reason be made, I am of opinion that the motion to vacate was properly denied, and that the order appealed from should be affirmed with costs.

FREEDMAN, J., concurred.

CURTIS, Ch. J. [concurring in result on different grounds.]—The order for the substituted service was made under the provisions of the act of 1853 (*Session Laws*, 974). This act is remedial in its character, and was probably intended to meet a class of cases not provided for in subdivision 2 of section 135 of the Code, which designates a mode of service where there is a departure from the State, with intent to defraud creditors, or to avoid the service of a summons, or a concealment within the State with a like intent.

It was evidently the intention of the framers of this provision of the statute of 1853, that no suitor should be deprived of his remedy, or hindered in the service of process against a resident of the State, where he could not "be found, or if found, avoids or evades

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Concurring opinion of CURTIS, Ch. J.

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service, so that it cannot be made personally." The rules of the United States supreme court direct that the process of subpoena issuing against the defendants on the filing of a bill in equity, shall be served by a delivery of a copy to the defendant personally, or by leaving a copy at the dwelling-house or usual place of abode of each defendant, with some person who is a member or resident in the family.

It is the aim of justice to protect both parties, and neither should be deprived their rights, and the courts are open to protect them from hardship either in efforts to serve process or from want of due notice.

In the present case the summons and complaint were served on the defendant Mrs. Youngs, March 27, 1876, who, as it appears by her affidavit, then, and for several months had been well acquainted with her husband's business affairs, and assisted him in conducting them. When the officer served the papers upon her, she, acting for and on behalf of her husband, refused him permission to see him, or to serve him, and made such statements about his health to the officer, that though her husband could have been found in the house at the time, he did not serve him. Mrs. Youngs was the agent and the custodian of her husband at this period, and as such, and for his welfare and interest, as she deemed it, thus enabled him to avoid personal service. It was simply an avoidance of personal service by the acts of defendant's agent and custodian, and the case appears to have been one where the defendant, either acting for himself, or through those who ordinarily acted for him, might very properly, in consideration of the condition of his health, decline and thereby avoid being served.

But the statute wisely provides that in such a contingency as this, there may be another mode of service by which the rights of all parties can be protected; for it must be observed that there are occasions for the



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Concurring opinion of CURTIS, Ch. J.

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commencement of suits where persons are made defendants whose interests would suffer detriment, unless there was some mode of bringing them within the remedial protection of the court, by other ways than by personal service.

It was not the intention of the legislature, that where physical disability interferes with and renders personal service dangerous to a defendant, and it is for that reason avoided by or on behalf of such defendant, that a suitor should be left remediless either to protect himself, or the party sought to be served.

The affidavit of the appellant Daniel S. Youngs, made four weeks after the substituted service, states that he was told by his wife, that this suit had been commenced, though he does not state when he was so told, and the clear and elaborate narration contained in it confirms his allegation as to his convalescence. It is apparent from the record that comes before the court on the defendant's appeals, that his interests are duly watched and protected, and there is no reason to believe that he has been otherwise than benefited by the order for a substituted service, under which he seems to have diligently proceeded in the litigation.

The order appealed from is not at variance with the views expressed in *Simpson v. Burch* (4 *Hun*, 315) and *Collins v. Ryan* (32 *Barb.* 647).

It should be affirmed without costs to either party.

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Statement of the Case.

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SIDNEY DILLON, AND OTHERS, PLAINTIFFS AND  
RESPONDENTS, v. JOHN S. MASTERSON, DE-  
FENDANT AND APPELLANT.

I. *CONTRACT, NON-PERFORMANCE BY THE TIME LIM-  
ITED.*

1. WAIVER OF.

(a.) WHAT IS.—Permitting the continuance of work under the contract after the time limited, is.

(b.) EFFECT OF.—The contract continues open for performance until another limit is fixed, either by the service of a notice requiring performance by a reasonable time therein specified, and notifying the party on whom it is served, that in case of default in so performing his rights would be deemed abandoned, or in some other manner.\*

1. *Effect of such a notice.*—In case of default in complying with it, the party giving it may rescind the contract *and retain* the benefits of a partial performance, but in such case he would waive his claim for damages.

(c.) NOTICE, WHAT NOT SUFFICIENT TO LIMIT THE TIME FOR PERFORMANCE.

1. One to the effect that the party serving it would take the further execution of the contract into his own hands, and complete the same for account of the party on whom it is served and hold him responsible in damages, is not.

1. *Effect of such a notice.*

1. It is an act of the party giving it, which prevents full performance by the other.

2. Consequently the party on whom it is served is entitled to recover the value of what he had done under the contract.

3. The party giving it is entitled, there being no unperformed condition on his part, to recover the damages sustained by him in consequence of the delay in performance.

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\* Compare *Kemple v. Darrow*, 39 N. Y. Sup'r Ct. 447.

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Statement of the Case.

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## 2. DAMAGES.

(a.) COLLATERAL CONTRACTS, DAMAGES SUSTAINED UNDER,  
WHEN RECOVERABLE.

1. When one, on making a contract with another, knows that that other party has an existing contract with a third party for the same work, and that such other party is making with him a sub-contract to the principal one, and he by his sub-contract agrees to supply the work necessary to fill the principal contract, any damage to the principal contractor, which would naturally flow from a breach by him of his principal contract in consequence of the default of the sub-contractor may be recovered of, or recouped against the sub-contractor.

1. *What damage does not so naturally flow.*

1. The damages, if such there are, arising from the refusal of the third party to give other contracts to the principal contractor, by reason of his being in default in his existing contract, which default was caused by the default of the sub-contractor, do not.

Before CURTIS, Ch. J., SANFORD and FREEDMAN, JJ.

*Decided March 5, 1877.*

This action arose out of a written contract, by which the plaintiffs agreed to furnish the necessary materials for filling up, and to complete the filling of Seventy-sixth street, in the city of New York, and have the same completed on or before June 1, 1873, and by which the defendant agreed to pay for such work, upon the completion thereof, at the rate of twenty cents per cubic yard.

The plaintiffs failed to complete the contract at the time agreed upon, but at the request of the defendant proceeded from time to time with the work until the month of December following, when the defendant terminated the contract by the following notice:

“In consequence of your violation of your contract dated February 13, 1873, for filling of Seventy-sixth street, between Lexington and Madison avenues, in

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Appellants' points.

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this city, and in consequence of the loss and damage caused to me by your non-fulfillment of the same; I hereby notify you that I shall now proceed to have the same completed and hold you personally responsible for the damages caused to me by your delay and action in the premises."

The plaintiffs thereupon brought this action to recover for the work done up to the time of the notice.

On the first trial, before a referee, the defendant had judgment, which was afterwards reversed by the general term (39 *N. Y. Super. Ct.* 133).

The case was re-tried before the court and a jury, and the plaintiffs had a verdict for the full amount of the work done.

The appeal is by the defendant from the judgment entered upon such verdict, and from the order denying his motion for a new trial.

*L. A. Gould*, attorney, and of counsel for appellant, upon the points discussed by the court, urged:—I. The complaint should have been dismissed as requested. The plaintiffs had abandoned the work before the service of the notice; the plaintiffs say they worked "till sometime in the fall, can't state the date exactly;" another says they quit the work some time in December; there is no denial of the defendant's testimony, that they had quit the work before he served the notice; they never offered, and there is no evidence that they ever intended to complete the contract. Even admitting that plaintiffs have a claim for work done, it could not become due till the contract was finished, which was long after the bringing of this suit, because defendant did nothing to hinder and used due diligence to complete the work, and plaintiffs do not show that they could or would have completed it at an earlier day (*Champlin v. Rowley*, 18 *Wend.* 187; *Wallman v. Society of Concord*, 45 *N. Y.*

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Respondent's points.

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485; *Cunningham v. Jones*, 20 *Id.* 486; *Mead v. Degolyer*, 16 *Wend.* 632).

II. The defendant suffered great damage from the plaintiff's delay and failure to complete the contract, all evidence of which the court rejected and excluded. The defendant did not waive his right to damages by excusing plaintiff's failure to perform within the time agreed upon (*Ruff v. Rinaldo*, 55 *N. Y.* 664; *Beebe v. Johnson*, 19 *Wend.* 500). This testimony was excluded on the theory that the damages were too remote, and did not flow directly from plaintiffs' breach of the contract. But defendant offered to show that the plaintiffs knew before entering into this agreement with the defendant that this was a sub-contract, that their failure to complete at the time fixed must of necessity put defendant in default and must cause him the very damages which he now sets up. The exclusion of this testimony was manifest error (*Messmore v. N. Y. Shot & Lead Co.*, 40 *N. Y.* 422; *Griffin v. Colver*, 16 *Id.* 493).

*Alex. Thain*, attorney, and of counsel, for respondent, on the points discussed by the court, urged:—I. Defendant's counter-claim is made up of damages for losses peculiar to a contract collateral to the one alleged to have been broken, and to which the plaintiffs were not parties: for such damages there can, therefore, be no recovery against them (*Masterton v. Mayor, &c. of Brooklyn*, 7 *Hill*, 61-68). Such damages are not fairly to be supposed to have entered into the contemplation of the parties at the time the contract between them was made, and are also disallowed as too remote and contingent (*Masterton v. Mayor, &c.* [*supra*], per NELSON, J., 68; *Griffin v. Colver*, 16 *N. Y.* 489-495). The questions, therefore, tending to show knowledge on the part of the plaintiffs that defendant had a contract with the city involving

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Opinion of the Court, by FREEDMAN, J.

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this and other work, were wholly immaterial. Had the parties intended that plaintiffs should be bound by the terms of such collateral contract, or had it been contemplated that they were to be answerable for damages so remote they would have made it so in the contract, and not left so important a question in doubt. The reference to the contract between the defendant and the city in the one between the plaintiffs and defendant could have had no other object than the identification of the work.

II. The motions to dismiss the complaint were properly denied. The plaintiffs had shown that they had furnished upwards of 20,000 yards of materials under their contract with defendant, and had failed to entirely complete the work because defendant assumed to complete it himself.

BY THE COURT.—FREEDMAN, J.—On the former appeal which had been taken by the plaintiffs, the general term of this court held, and the point actually decided was, in substance, that inasmuch as the contract had been kept alive by the acts of the parties after the expiration of the time limited for the performance thereof, if the defendant had wished to annul the rights of the plaintiffs under the same, he should have given them a notice requiring performance within some reasonable time specified, and further notifying them, that in case of default their rights would be deemed abandoned; and that no such notice having been given plaintiff's action for the price should have been sustained.

On the trial which is now the subject of review, the plaintiffs obtained a verdict, but the defendant was not permitted to recover any damages suffered in consequence of plaintiffs' delay in completing the work, and the principal question involved in the present appeal

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Opinion of the Court, by FREEDMAN, J.

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is, whether the defendant has a right to recoup such damages, and, if so, to what extent he may do so.

Upon plaintiffs' failure to complete, at the time designated in the contract for the completion thereof, defendant might have rescinded.

He elected not to do so, but from time to time he called upon the plaintiffs to proceed with it, which they did to some extent up to the month of December following, when they again ceased work. Both parties, therefore, departed from the provision of the contract as to time, and hence plaintiffs' rights could not be annulled without another time being fixed and a new default being made.

In the month of December following, on becoming tired of plaintiffs' dilatoriness and apparent abandonment of the contract, the defendant did serve a notice. But instead of serving one which called upon the plaintiffs to complete within some reasonable time therein specified, and which notified them that in case of default their rights would be deemed abandoned, he served a notice to the effect that he would take the further execution of the contract into his own hands and complete the same for account of the plaintiffs and hold them responsible in damages.

Full performance on the part of the plaintiffs having been thus prevented by the deliberate act of the defendant, plaintiffs were entitled to recover for what they had done up to that time, and the defendant was bound to make the compensation. This liability on the part of the defendant, however, is coupled with his right to insist upon a deduction for the damages sustained by him in consequence of the delay.

Had he first notified the plaintiffs to complete within a reasonable time specified, he might, on their default, have rescinded and retained the benefit accruing to him from a partial performance. In such case he would have waived his claim for damages.

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But having adopted the other course, which was in affirmance of the contract, and which rendered him liable to pay for such partial performance, and there being no condition of the contract unperformed on his part at the time of such election, he is not estopped from claiming damages (*Ruff v. Rinaldo*, 55 *N. Y.* 664; *Cassidy v. Le Fevre*, 45 *Id.* 562; *Dibble v. Corbett*, 5 *Bosw.* 203; *Sinclair v. Tallmadge*, 35 *Barb.* 602).

The question therefore remains, what damages the defendant is entitled to.

No effort was made to show, and indeed it is not claimed, that the defendant incurred a larger expense in doing the work which he did himself subsequent to the notice given, than he would have incurred if he had permitted the plaintiffs to finish their contract.

It appears, however, that the whole work to be done by the plaintiffs for the defendant under the contract in question, was embraced in a prior contract between the defendant and the corporation of the city of New York, and the contract between the parties to this action *recites such fact*.

At the trial the defendant offered his contract with the city in evidence, for the purpose of thereby laying the foundation for the proof of damages which he alleged he sustained under that contract by reason of plaintiffs' delay, and it was excluded.

He also offered to show that the plaintiffs had examined the said contract of the defendant with the city, that they knew its terms and conditions, and that defendant's liability under the same was dependent upon the performance of plaintiffs' contract, before plaintiffs entered into the contract in suit, and that the former constituted the basis upon which the latter was made. This testimony was excluded.

I am of the opinion that these rulings constituted error.



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Opinion of Court, by FREEDMAN, J.

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True, in ordinary cases and under the operation of the rule applicable to that class of cases, that damages, in order to be recoverable, must not only be such as might naturally be expected to flow from the violation of the contract in suit, and such as are certain both in their nature and in respect to the cause from which they proceed, but must also be such as may fairly be supposed to have entered into the contemplation of the parties at the time of the execution of the contract, in settling the amount of damages to be recovered for the breach of the principal contract, damages sustained on collateral contracts entered into as subsidiary to the fulfillment of the principal one, cannot be considered (*Masterton v. Mayor, &c. of Brooklyn*, 7 *Hill*, 61).

But when the sub-contractor, at the time of making his contract, knows that the principal contractor has an existing contract for the same work, and that the sub-contract is made to fulfill the principal contract, and the sub-contractor agrees to supply the work to enable the principal contractor to fulfill his contract, any damage which the principal contractor might naturally be expected to sustain under his contract in consequence of the default of the sub-contractor, may justly be said to have entered into the contemplation of the parties to the sub-contract, and may be recovered for that reason, if subsequently sustained and capable of being ascertained with certainty (*Messmore v. N. Y. Shot and Lead Co.*, 40 *N. Y.* 422).

The evidence should, therefore, have been received, and then the duty would have devolved upon the court to see to it, that the defendant recovered no damages except such as clearly and naturally flowed from the breach of the contract with the city, as necessitated by plaintiffs' breach of their contract with him. Defendant's claim for damages in being kept from obtaining other contracts, can under no circumstances be sustained; but as to his right to recover any of the other

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Statement of the Case.

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items set forth in his bill of particulars, in respect to which he ineffectually sought to give testimony, I am unable to form an opinion without having the excluded contract before me.

Inasmuch as it sufficiently appears, however, that the excluded testimony above referred to, together with other proof subsequently offered and likewise rejected, might have entitled the defendant to some recoupment, the judgment and order appealed from should be reversed, and a new trial ordered, with costs to appellant to abide the event.

CURTIS, Ch. J., and SANFORD, J., concurred.

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FREDERICK W. MOORE, *et al.*, PLAINTIFFS, v.  
LOUIS J. BELLONI, JR., DEFENDANT.

I. EVIDENCE.

1. WRITTEN INSTRUMENTS.

(a.) *Copies, when admissible without accounting for the originals.*

1. When the party against whom they are offered, furnished them to the party on whose behalf they are offered, as a guide in the performance of the contract contained in the originals to be performed by the latter for the former.

II. BILL OF PARTICULARS.

1. WHEN DEMANDABLE AS A MATTER OF RIGHT.

(a.) Only when the action is on *an account stated*, not when it is based on the original indebtedness.

1. *Held in this case not to be demandable.*

2. PRECLUDING THE GIVING OF EVIDENCE FOR NOT FURNISHING ON DEMAND, IN A CASE WHERE IT IS DEMANDABLE.

(a.) *Order at special term.* An order to that effect should be obtained at special term in advance of the trial.

(b.) *Application at the trial.* If the motion to produce is made

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Statement of the Case.

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in the first instance at the trial, it is then *at best* addressed to the discretion of the trial judge, *the exercise of which should not be interfered with on appeal.*

Before CURTIS, Ch. J., SANFORD and FREEDMAN, JJ.

*Decided March 5, 1877.*

*Exceptions heard at general term.*

The defendant consigned to the plaintiffs, who are merchants at Buenos Ayres and Monte Video, two cargoes of coal for sale on commission.

The action is brought by the plaintiffs to recover for advances and an alleged balance for disbursements on account of freight, demurrage, &c., over and above the proceeds realized from the sale of the coal.

The complaint was as follows: "For a first cause of action, plaintiffs allege that on or about September 30, 1872, the defendant consigned to the plaintiffs a cargo of coal by the bark "Margaret S. Weir," to take charge of and sell the same for the account of the defendant, and on which the plaintiffs, at the special instance and request of the defendant, advanced to the defendant the sum of five hundred and twenty-two pounds eighteen shillings and eleven pence, British money, on the sixteenth day of December, 1872, and that thereafter the said cargo of coal arrived at Monte Video, and was there received by the plaintiffs, and the freight and other charges thereon paid by the plaintiffs, and thereafter the said cargo was sold, and on the eighteenth day of March, 1873, the plaintiffs received the proceeds of said cargo and applied the same in payment of the freight and charges by them paid, and after so applying the same, there remained a balance due the plaintiffs of four hundred and eighty-seven pounds eighteen shillings and four pence, which, together with the aforesaid sum of five hundred and

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twenty-two pounds eighteen and eleven pence, and the further sum of seven pounds sixteen shillings and ten pence for commission, together amount to the sum of ten hundred and eighteen pounds fourteen shillings and one penny, British money, and which sums the defendant promised to pay to the plaintiffs.

“That the value of said ten hundred and eighteen pounds fourteen shillings and one penny in the currency of the United States is the sum of seven thousand dollars.

“*Second.* And for a second and distinct cause of action the plaintiffs allege that, on or about the third day of December, 1872, the defendant consigned to the plaintiffs a cargo of coal by the bark ‘Kestrel,’ to take charge of and sell the same for the account of the defendant, and on which the plaintiffs, at the special instance and request of the defendant, advanced to the defendant the sum of two hundred and seventy-three pounds fifteen shillings and seven pence, British money, on the seventeenth day of February, 1873, and that thereafter the said cargo of coal arrived at Monte Video, and was there received by the plaintiffs, and the freight and charges thereon paid by the plaintiffs; and thereafter the said cargo was sold, and on the nineteenth day of March, 1873, the plaintiffs received the proceeds of said cargo, and, after paying the said freight and charges by them paid, applied the balance thereof, to wit, the sum of eighty-one pounds thirteen shillings in payment of said advance, and the interest and commissions thereon, amounting to the sum of five pounds five shillings and five pence, leaving a balance then due the plaintiffs thereon of one hundred and ninety-seven pounds eight shillings, which sum the defendant promised to pay to the plaintiffs, with interest thereon from the nineteenth day of

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Plaintiff's points.

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March, 1873. That the value of said one hundred and ninety-seven pounds eight shillings in the currency of the United States is the sum of thirteen hundred dollars.

“Wherefore plaintiffs demand judgment against the defendant for the sum of eight thousand three hundred dollars, with interest on thirty-five hundred dollars from the sixteenth day of December, 1872, and on forty-eight hundred dollars from the nineteenth day of March, 1873, besides costs.”

On the trial the court ordered a verdict for the plaintiffs for \$6,744.15 in gold, and directed defendant's exceptions to be heard in the first instance at the general term.

*Scudder & Carter*, attorneys, and *George A. Black*, of counsel, for plaintiff, on the questions discussed by the court, urged:—I. The defendant's exceptions to the admission of the evidence of payments made by plaintiffs and his objection thereto are based upon a demand of copies of the accounts and omission to serve them. The answer to the objection is two-fold: 1. The complaint does not allege any account, and the action is not in its nature based upon an account, but is for money lent and paid, laid out and expended, and there was consequently no items of an account to set forth (*Code*, § 158). 2. If the defendant desired to preclude the plaintiff from giving evidence on the ground of failure to comply with the demand, his remedy was to apply to the court, at special term, and have the question settled there, in advance of the trial (*Kellogg v. Paine*, 8 *How.* 332; *Goring v. Patten*, 17 *Abb.* 339).

II. The exceptions of defendant to the admission of the copy charter-parties are not well taken. If the originals were the best evidence, the defendant had notice to produce them, and failed to do so. But,

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Opinion of the Court, by FREEDMAN, J.

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taken in connection with the evidence that the broker always kept the original charter-party, and furnished copies to the parties, and with the defendant's letters, in evidence, mentioning the inclosure of the charter-parties to the plaintiffs' agent, and the evidence of Hughes that the documents had gone to Moore and Tudor by mail, had come back to Hughes and been handed by him to the plaintiffs' attorney, and were produced by them on the trial and identified, they were sufficiently proved. But the copies were in this case the best evidence. They were what the defendant furnished to the plaintiffs as their guide, as to the contract they were to perform for him.

*George L. Ingraham*, attorney, and *Charles A. Davison*, of counsel, for defendant.

BY THE COURT.—FREEDMAN, J.—The action is for advances and disbursements made over and above the proceeds realized from the goods consigned. There were two distinct consignments. The first was made in September, 1872, by the bark *Margaret S. Weir*, and the second in the month of December following, by the bark *Kestrel*. Defendant's answer is in effect a general denial, except as to the advances which are admitted.

Defendant complains that against his objection and exception the court, upon the trial, admitted in evidence copies of the charter-party of both vessels.

Notice had been served on defendant's attorney to produce the originals, but they had never been in his possession or in that of the defendant. George H. Brewer, a witness, had been subpoenaed to produce them, but it turned out that at the time of the service of the subpoena he was no longer connected with the shipping firm which had the custody of them. Nor was any proof given that a search had been made

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Opinion of the Court, by FREEDMAN, J.

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for them and that they could not be found. Unless, therefore, the copies were admissible without accounting for the non-production of the originals, they were improperly received.

Proof was given, however, of the due execution of the originals by the defendant, and then it was shown that the shipping brokers always kept the original charter-party and furnished copies only to the parties in interest; that this custom was observed in this case; that the defendant received his copies, which were certified, and handed the copy relating to the bark Margaret S. Weir over to plaintiffs' agent in the city of New York, who mailed the same to the plaintiffs; that the copy received by the defendant relating to the bark Kestrel was mailed by the defendant himself to the plaintiffs; that the plaintiffs subsequently sent both copies so mailed to them back to their agent in the city of New York, and that said agent handed them over to plaintiffs' attorney, who produced them in court.

Having been thus identified and connected with the defendant, the copies produced and put in evidence were clearly admissible. Indeed it may be said, that such copies were, as between the plaintiffs and the defendant, the best evidence, for they were furnished by the defendant to the plaintiffs as a guide, in the performance of the contract which they were to perform for him.

The defendant also objected to the admission in evidence of certain accounts of sales and disbursements relating to the cargo of the bark Margaret S. Weir, upon the grounds, first, that the defendant had, during the pendency of the action, demanded copies of the accounts mentioned in the complaint, and that the plaintiffs had omitted to furnish the same, and hence were precluded under section 158 of the Code from giving evidence thereof; and secondly, because, as they

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Opinion of the Court, by FREEDMAN, J.

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claimed, there was no evidence that the accounts offered had ever been rendered to the defendant.

As to the first ground of objection the answer is twofold :

1. The complaint does not proceed upon an account stated. It is for moneys advanced, laid out and expended for defendant's use, and it specifies the facts and circumstances under which, and the manner in which, it was done. The causes of action pleaded are based, therefore, upon the original indebtedness. It is only in cases in which the pleading is based upon a specific account, set forth in the manner permitted by section 158, that the items may be called for as matter of right.

2. Even if the complaint could be deemed to allege an account, if the defendant desired to preclude the plaintiffs from giving evidence thereof, on the ground of failure to comply with the demand, he should have applied to the court at special term, and have the question settled there in advance of the trial. Having delayed until the trial, the motion to preclude the plaintiffs was at best addressed to the discretion of the presiding judge, and the exercise of his discretion should not be interfered with, especially when it appears, as it does in this case, that the accounts were rendered to the defendant before the commencement of the action, and that their correctness as to items was expressly acknowledged by him.

As to the second ground of objection :

It distinctly appears that accounts were rendered by plaintiffs to defendant of both consignments. The defendant, by letter, acknowledged that he had examined them, and that they were correct as to figures. These accounts he had notice to produce, but he failed to do so. The plaintiffs thereupon offered a copy of the account relating to the Kestrel, and the same was received without objection. The account of the Mar-



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Opinion of the Court, by FREEDMAN, J.

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garet S. Weir, it seems, was transmitted by the plaintiffs to their agent in New York on the same sheet with the account of another vessel called the James Kitchen, in which defendant had no interest, and so much of the account as related to the Margaret S. Weir was offered and put in evidence after proof had been made that the agent referred to had shown the whole document to the defendant, and had discussed it with him, and that he had furnished the defendant with a copy of so much of it as related to the Margaret S. Weir.

No error was therefore committed in receiving the accounts.

The defendant finally claims that the case should have been submitted to the jury on the question whether the defendant is chargeable with the lighterage, demurrage and cartage set forth in the accounts.

The evidence was not only abundant, but uncontradicted, and all the facts and circumstances in the case seem to corroborate it, that these charges were incurred by the plaintiffs in good faith and necessarily, and hence plaintiffs were entitled to have the jury so instructed.

There are other exceptions in the case, but, as they have not been noticed in defendant's points, they may be deemed to have been waived.

Defendant's exceptions should be overruled and judgment ordered for the plaintiffs, upon the verdict, with costs.

CURTIS, Ch. J., and SANFORD, J., concurred.

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Statement of the Case.

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## RICHARD D. CROTTY v. DUNCAN E. McKENZIE.

### I. ATTORNEY'S LIEN.

#### 1. AS BETWEEN PLAINTIFF'S ATTORNEY AND HIS CLIENT.

The attorney has a lien on the judgment in favor of his client, for compensation for his services.

1. *Measure of lien.* The sum agreed to be paid, or if there is no agreement, then the reasonable value of the services.

(a.) *Reasonable value, prima facie evidence of; Costs.*

1. The sums recovered by a party, *sub nomine* costs, as an indemnity for his expenses, are, *prima facie*, the measure of the compensation to which his attorney is entitled.

#### 2. AS BETWEEN THE PLAINTIFF'S ATTORNEY AND THE DEFENDANT.

Liability of defendant for compensation of plaintiff's attorney after a settlement between him and plaintiff.

1. *Not liable unless,*

1. Notified before the settlement that plaintiff's attorney claims a lien.
2. The settlement was made collusively, without the knowledge of the attorney, with the view of depriving him of his compensation.

2. *Measure of liability*—Cannot exceed the amount of the verdict or judgment.

#### 3. ENFORCEMENT OF.

1. *How not to be enforced.*

(a.) Cannot be by issuing execution on a judgment satisfied of record.

1. The satisfaction must first be vacated on motion.

### II. EXECUTION.

#### 1. JUDGMENT SATISFIED OF RECORD.

1. An execution cannot issue thereon.

(a.) *Sweet v. Bartlett*, 4 Sandf. 661, is not an authority to the contrary.

Before SANFORD and FREEDMAN, JJ.

*Decided March 5, 1877.*

*Appeal by attorney for plaintiff.*

This is an appeal taken by plaintiff's attorneys

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Statement of the Case.

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from an order made at special term setting aside an execution and levy made thereunder.

Execution was issued October 25, 1876. The judgment upon which it purported to be issued was satisfied of record on October 17, 1876, and so marked upon the docket. Upon affidavit showing these facts, defendant moved to set aside the execution and levy.

Plaintiff's attorneys opposed on the ground that they had a lien on the judgment for services rendered to the extent of \$210.80, of which \$160.80 were for taxable costs, and the remaining \$50.00 had been agreed by the plaintiff to be paid to them, and that the case had been settled fraudulently and collusively between defendant's attorneys and a Mr. Thompson, who had, to some extent at least, been intrusted by plaintiff's attorneys with the possession of the papers and the management of the suit, with the design to defeat plaintiff's attorneys' lien for costs.

No notice of such lien had ever been given to defendant or his attorneys.

The court granted the motion, and plaintiff's attorneys appealed.

At special term the following opinion was delivered.

"CURTIS, C. J.—The plaintiff recovered a judgment, August 31, 1876, for \$273.80. The defendant appealed to the general term. The judgment included plaintiff's taxed costs, \$160.80, and \$50 agreed by the plaintiff, to be paid to his attorney. The plaintiff and the defendant's attorneys entered into an arrangement by which the judgment was paid and satisfied October 17, 1876, without the knowledge of the plaintiff's attorney. The latter, upon discovering it, issued an execution on the judgment, requiring the sheriff to levy the amount of his costs and counsel fee. The defendant now moves to vacate this levy and execution, and the attorney claims that his client, the plaintiff, is pecuniarily

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Statement of the Case.

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irresponsible, and that the parties entered into the arrangement in order to defraud him of his costs, and with knowledge of his lien.

“There is no substantial proof impeaching the good faith of the satisfaction of the judgment, and it does not appear that the plaintiff's attorney took the precaution to protect his lien for costs by serving a notice of it upon the judgment debtor. The lien and the right to enforce it are controverted on the part of the defendant.

“In *Rooney v. Second Avenue Railroad Co.* (18 N. Y. 368) the somewhat divergent views expressed in reference to the effect of the Code upon the lien of an attorney upon the judgment recovered by him, are considered, and the conclusion is arrived at, that such lien is not abolished, and is not measured by the actual costs, but covers any portion of the damages which may have been stipulated for the compensation of the attorney's services. This court early took this position and refused to set aside an execution issued by the plaintiff's attorneys to collect the costs, on which they had a lien by judgment, when the plaintiff and defendant, without their knowledge, had settled the litigation and satisfied the judgment. OAKLEY, C. J. (all the rest of the judges concurring), stated that it was the determination of the court to sustain the lien of the attorney, and that, where his right to the costs was established, the court would protect it so far as it could, because, however the matter might be technically, the costs were in reality his property. It was further held that an attorney had no lien for his costs, until a judgment was entered, or at least not until after verdict, and that until the lien attaches, the parties can settle the suit regardless of his claim for costs. But after the attorney's right to costs is fixed by a verdict or judgment, then the parties are no longer at

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Statement of the Case.

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liberty to settle, disregarding his interests in the matter (*Sweet v. Bartlett*, 4 *Sandf.* 661).

“In the case of *Ward v. Syne* (9 *How. Pr.* 16) it was also held by the general term of the court of common pleas (Judges DALY and WOODRUFF concurring), that the Code did not affect the attorney's lien for his services.

“In *Ackerman v. Ackerman* (14 *Abb. Pr.* 229) the general term of the court of common pleas held that although the lien of the attorney for costs was one which the court would enforce, yet payment by a judgment debtor to a judgment creditor of the judgment, was valid against the lien of the attorney, unless the debtor had notice of the attorney's claim by way of lien to a portion of such judgment.

“It was also held that although an execution could be issued upon a judgment which had been satisfied, yet that if the satisfaction was voidable for any cause, it must be vacated by the court before execution could be issued.

“In *Bishop v. Garcia* (14 *Abb. Pr. N. S.* 72), the principle was concurred in, that if an attorney desires to protect his lien for costs and expenses against the settlement of a judgment, he must give notice of the lien to the judgment debtor.

“In *Sweet v. Bartlett* (*supra*) the defendants do not appear to have raised the objection that they had not been notified of the attorney's lien for costs, and the effect of such an omission on the part of the plaintiff is not considered; but as that arises in the present case, it would seem a more just and equitable rule that the plaintiff's attorney should, before attempting to enforce his lien, be required to give such notice, and that it would be better to apply to the court, before he issues his execution, for an order to vacate the satisfaction of the judgment.

“In *Marshall v. Meeks* (51 *N. Y.* 140) these views

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Appellant's points.

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as to an attorney's lien for his costs are confirmed, and it was held that where the judgment was for costs solely, it was in itself a legal notice of the lien, which could be discharged only by payment to the attorney, and by a divided court, it was held, that where the judgment issues for both damages and costs, such lien could only be protected by notifying the judgment debtor. This mode of protecting this lien by such notice is recognized in *Pulver v. Harris* (52 N. Y. 73), and in *Leshner v. Egidus* (3 Hun, 217).

"It is with reluctance I feel constrained by the weight of the later authorities to set aside an execution issued in accordance with what might seem to be the settled practice of this court, as expressed in *Sweet v. Bartlett* (*supra*).

"The execution and levy sought to be set aside on the part of the defendants must be vacated, but without costs."

*Culver, Bertram & Phillbrook*, plaintiff's attorneys, and appellant in *propria personæ*, and *H. B. Phillbrook*, of counsel, urged:—I. The attorney for party recovering a judgment is assignee of the judgment to the extent of costs, and also his fee, if agreed upon, and courts will always protect his rights (5 *Bosanquet & Pulner*, 99; 10 *Wend.* 617; 15 *Johns.* 405; 4 *Sandf.* 661; 40 *N. Y.* 580; 12 *Abb. Pr.* 325; 7 *Id.* 210; 16 *How.* 173; 1 *Id.* 94; 8 *Hun.* 136; 4 *Cow.* 416; 9 *How.* 460; 1 *Sprague*, 11, 126, *U. S. Dist. Ct.*; 10 *Wall.* 483, *U. S. Supreme Ct.*; *Rooney v. Second Avenue R. R. Co.*, 18 *N. Y.* 368).

The attorney being assignee of the judgment to the extent of costs and fees, whoever has knowledge of his interest has sufficient notice (4 *Barb.* 47; 12 *Johns.* 343; 1 *Johns. Cas.* 51; 10 *Wend.* 617; 6 *How.* 161; 3 *Id.* 386).

*Butler, Stillman & Hubbard*, attorneys, and of

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Respondent's points.

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counsel, for the defendant and respondent, urged:—I. An execution cannot be issued upon a judgment which has been satisfied by the filing of a certificate as prescribed by the Revised Statutes. If the satisfaction is voidable for any cause, it must be vacated by the court before execution can be issued (*Ackerman v. Ackerman*, 14 *Abb. Pr.* 229, and cases cited; *Foote v. Dillaye*, 65 *Barb.* 521; *Booth v. Farmers & Mechanics' Bank*, 4 *Lans.* 307; 3 *Rev. Stat.* 6 ed. 620, §§ 22, 24). 1. After satisfaction of record, there is no judgment upon which an execution can issue. Since the adoption of the Revised Statutes, the satisfaction is a part of the record of the court, and operates to extinguish the judgment (*Booth v. Farmers & Mechanics' Bank*, *supra*). 2. The lien of an attorney is only an equitable lien, the proceeds not being in his hands. His remedy in the first instance is to move the court to vacate the satisfaction-piece (*Ackerman v. Ackerman*, *supra*; *Ward v. Wordsworth*, 1 *E. D. Smith*, 598; *Rooney v. Second Avenue R. R. Co.*, 18 *N. Y.* 368; *Pearl v. Robitchek*, 2 *Daly*, 138; *McDowell v. Second Avenue R. R. Co.*, 4 *Bosw.* 670; *Bishop v. Garcia*, 14 *Abb. Pr. N. S.* 69, 72). The case of *Sweet v. Bartlett*, (4 *Sandf.* 661), relied upon by appellant, was decided before the practice was settled; if it has the effect claimed by the appellant, it has been substantially overruled by the court of appeals; it does not appear that in that case the judgment was satisfied of record, nor that this question was argued at all; and in that case there was positive evidence of fraud (See opinion of CURTIS, Ch. J., in this case; *Marshall v. Meeks*, 51 *N. Y.* 140; *Pulver v. Harris*, 53 *Id.* 73; *Leshner v. Roessner*, 3 *Hun*, 217).

II. There was no fraud in the settlement. This has been established in this court, and until that adjudication is reversed, the decision is conclusive. 1. No notice of any lien was ever given. The authorities are

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Opinion of the Court, by FREEDMAN, J.

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conclusive upon the point that such notice is absolutely necessary in order to defeat a settlement (See cases cited *supra*). The fact that a judgment is partly for costs and partly for damages does not constitute notice, either actual or implied (Marshall v. Meeks, 51 N. Y. 140).

BY THE COURT.—FREEDMAN, J.—Before the Code, costs were taxed under the name of attorney's and solicitor's fees, and the taxable costs formed the measure of the compensation of the attorney or solicitor. By the Code all statutes establishing or regulating the costs or fees of attorneys, solicitors and counsel in civil actions, and all rules and provisions of law restricting or controlling the right of a party to agree with an attorney or counsel for his compensation, are repealed, and the measure of such compensation is left to the agreement, express or implied, of the parties.

At the same time, the Code allows certain costs to the party as an indemnity for his expenses in the action.

The lien of the attorney upon the judgment he recovers is not affected by the change, because such lien did not arise from any fee-bill, but was established by a long current of authority.

Such lien, however, is no longer measured by the taxable costs. The compensation to which he is entitled for his services may now be determined as in other professions, namely, either by express contract, or where there is no agreement as to amount, by the value of the services rendered, which means a reasonable value (Stow v. Hamlin, 11 How. Pr. 452; Garfield v. Kirk, 65 Barb. 464); and the sum so agreed upon, or said value, may, according to circumstances, exceed or fall below the taxable costs (Rooney v. Second Ave. R. R. Co., 18 N. Y. 370); although, in the absence of an agreement upon the subject, the sum recovered by



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a party as an indemnity for his expenses are *prima facie* the measure of the compensation to which the attorney is entitled.

It is only when circumstances warrant it that the court, in the absence of an agreement, will allow the attorney better compensation than the bill of costs, as taxed, will afford (*Cregier v. Cheesbrough*, 25 *How.* 200).

Whenever there is a lien, it attaches for the entire amount which he is entitled to claim as the measure of his compensation (*Rooney v. Second Ave. R. R. Co.*, 18 *N. Y.* 368; *Ackerman v. Ackerman*, 14 *Abb.* 229; *Marshall v. Meech*, 51 *N. Y.* 141). But it has been held that such lien does not attach before judgment, or at least not till after verdict (*Shank v. Shoemaker*, 18 *N. Y.* 489; *Sweet v. Bartlett*, 4 *Sandf.* 661).

There is no doubt, however, that in case of collusion or fraudulent design the protection of the court may, even before verdict, be extended to the attorney, so far as to deny to a party the benefit of a proposed discontinuance, or of a supplemental answer showing settlement, except upon the condition of payment of the costs of the action (*Dietz v. McCallum*, 44 *How. Pr.* 493, and cases therein cited).

Thus it will be seen that it is the settled policy of the courts to protect the rights of the attorney, so far as it may be done consistently with other rules of law; for, as it was said in *Sweet v. Bartlett* (4 *Sandf.* 661), however the matter might be technically, the costs are in reality his property.

But notwithstanding this benevolent disposition exists on the part of the courts, the attorney has no right to rely upon it as against the adverse party to the action. As against him the attorney should protect himself, and in many, if not most cases, this can be done by a notice.

Without notice the adverse party in the action is

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Opinion of the Court, by FREEDMAN, J.

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under no obligation to the attorney not to settle with his client.

True, when the judgment recovered is solely for costs, it is in itself legal notice of the attorney's lien. But when it is damages and costs, the rule is now held to be otherwise. In such case the judgment is no notice at all, not even as to costs, and actual notice is necessary (*Marshall v. Meech*, 51 *N. Y.* 140; *Pulver v. Harris*, 52 *Id.* 73). And before judgment the full bench of this court has stated the rule to be as follows:

“If an attorney has omitted to protect himself by a notice forbidding a settlement without him, and the parties compromise the action before judgment, of which he has notice, he then proceeds in the suit for his costs at the peril of establishing conclusively, that the adverse party had the design, when making the settlement, of defeating his demand for the costs. If he fail in satisfying the court of this, his proceedings, subsequent to notice, will be set aside” (*McDowell v. Second Avenue R. R. Co.*, 4 *Bosw.* 670).

The result of the foregoing examination is that, as between themselves and their client, plaintiff's attorneys had a lien on the judgment recovered to the extent of \$210.80. But how does the case stand as against the defendant? The judgment being for damages and costs, it was, under the decision of the court of appeals in *Marshall v. Meech*, no notice to him for any purpose, nor was any notice of the lien claimed by the attorneys ever served upon him. Besides, in the settlement complained of, they were represented by a Mr. Thompson, who seems to have possessed some apparent authority from them.

But the gravest mistake made by them was committed in issuing an execution upon a judgment that had been regularly satisfied of record.

An execution cannot be issued upon a judgment which has been satisfied by the filing of a certificate as

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Opinion of the Court, by FREEDMAN, J.

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prescribed by 2 *R. S.* 362, §§ 22, 24. If the satisfaction is voidable for any cause, it must be vacated by the court before execution can be issued. This has been expressly held by the general term of the court of common pleas, and is undoubtedly sound law (*Ackerman v. Ackerman*, 14 *Abb. Pr.* 229, and cases cited). The reason is that since the adoption of the Revised Statutes the satisfaction is a part of the record, and operates to extinguish the judgment (*Booth v. Farmers' & Mechanics' Bank*, 4 *Lans.* 307). This reason applies with two-fold force to the lien of the attorney, which is only an equitable one, as long as the proceeds are not in his hands.

Plaintiff's attorneys should, therefore, have moved to vacate the satisfaction before issuing execution. *Sweet v. Bartlett* (4 *Sandf.* 661) is not an authority for their position. It does not appear that in that case the judgment was satisfied of record, nor was the question raised so far as the report shows; but it does appear distinctly that, after the settlement, the attorney obtained an affirmance, procured a remittitur, entered a fresh judgment thereon, and then issued execution upon the latter judgment.

The order should be affirmed with costs to be paid by the appellants personally.

SANFORD, J., concurred.

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Statement of the Case.

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JOHN RYAN, PLAINTIFF, v. THE MAYOR, &c.,  
OF NEW YORK, DEFENDANT.

I. DEMURRER TO ONE OF SEVERAL DEFENSES, ON THE  
GROUND OF INSUFFICIENCY.

1. ORDER SUSTAINING DEMURRER WITH LEAVE TO DEFENDANT TO  
AMEND. EFFECT OF.

(a.) *Determination.* Such order is a determination that the averments in the defense demurred to constitute no defense; and remaining unreviewed, the determination is *conclusive on the trial of the cause.*

II. ANSWER.

1. IMPLIED DENIAL, WHAT IS NOT.

(a.) A denial of an averment of *rendition of services in a certain capacity* is not a denial of an averment of *recognition and employment in such capacity.*

Before CURTIS, Ch. J., SANFORD and FREEDMAN, JJ.

*Decided March 5, 1877.*

*Exceptions heard at general term.*

The action was brought by the plaintiff to recover four months' salary, to wit, from September 1, 1871, to January 1, 1872, as attendant on and messenger of the superior court.

The complaint and answer were as follows :

"The complaint of the plaintiff respectfully shows to the court :

"*First.* That the defendants are a municipal corporation organized and existing under and by virtue of their ancient charters and the laws and statutes of the State of New York.

"*Second.* That under the provisions of an act of the legislature of the State, passed April 11, 1849, constituting section '28' of the Code of Procedure, this plaintiff was appointed by the board of supervisors

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Statement of the Case.

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of the county of New York, in or about the month of February, 1869, an attendant and messenger of the superior court of the city of New York, and employed for no definite period to attend upon the said court, and to perform the duties required to be performed by him.

“*Third.* That thereupon he entered upon the performance of his duties as such attendant and messenger, and continued to perform the same up to or about June 15, 1874, under and by the direction of the several judges of said court, who recognized and employed this plaintiff in and about said court as such attendant.

“*Fourth.* That by a resolution of the board of supervisors of the county of New York, duly passed on or about February 13, 1869, the compensation to be paid this plaintiff was fixed at one thousand dollars per annum.

“*Fifth.* That the plaintiff has been paid for his services as attendant and messenger upon the said court as aforesaid at the said rate of one thousand dollars per annum up to the month of September, 1871, and that for the months of September, October, November and December, 1871, he has not been paid, and there is now due therefore at the said rate the sum of \$333.33 with interest.

“*Sixth.* That the claim of this plaintiff has been presented to the comptroller of the defendants, and more than thirty days have elapsed since such presentation and payment demanded, and that said claim has not been paid, and still remains due to the plaintiff, &c.”

Defendants' answer to the complaint was as follows :

“*First.* Defendants aver that on February 13, 1869, the board of supervisors of the county of New York had no power, authority or jurisdiction to appoint the

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Plaintiff's points.

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plaintiff to the office of messenger or attendant as alleged in the complaint herein. That the said office of the plaintiff had not theretofore existed, and pursuant to section 4 of chapter 854 of the *Laws of* 1868, the said board of supervisors were prohibited from creating the same.

“*Second.* And as a second and further defense herein, defendants deny that the plaintiff performed any service whatever as attendant and messenger in the superior court in the city of New York, during the months of September, October, November and December, 1871.

“Defendants demand that said complaint be dismissed with costs.”

The plaintiff demurred to the first defense for insufficiency.

The demurrer, after argument, was sustained at special term, and an order entered sustaining the demurrer and giving defendant leave to amend. Defendant neither appealed from the order nor amended his pleading.

In this condition of the pleadings, the case came on for trial before the court and a jury.

On the trial the court directed a verdict for the plaintiff for the full amount, and ordered defendant's exceptions to be heard in the first instance at general term.

*Elliott Sandford*, attorney, and of counsel, for plaintiff, on the points decided by the court, urged:—I. When the action was tried below, the case stood as if the first defense had never been pleaded. A defendant cannot avail himself at the trial of defenses to which demurrers have been interposed and sustained (*Baldwin v. U. S. Telegraph Co.*, 1 *Lans.* 125, 135).

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Opinion of the Court, by FREEDMAN, J.

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The only issue, therefore, to be considered at the trial, was the rendition of services.

II. During the trial, defendant's attorney moved to dismiss the complaint for the reason that the plaintiff had not shown that he had been recognized as an officer by the judges. The motion was correctly denied, for the reason that there was no such issue in the case, the complaint alleging that such was the fact and the answer not denying it. Furthermore, there was proof already before the court that plaintiff had been employed and rendered service under the eye of the court, and that, in law, was an appointment and a recognition.

*Wm. C. Whitney*, counsel to the corporation, and *Charles P. Miller*, of counsel for defendants, on the points decided by the court, urged:—The position taken by defendants is, that the allegation in the second paragraph or subdivision of their answer, which denies “that plaintiff performed any services whatever, as an attendant and messenger in the superior court,” during the months for which suit is brought, raises the issue fairly, for if plaintiff performed no service, there could have been no ratification or recognition—there being nothing to ratify or recognize.

BY THE COURT.—FREEDMAN, J.—Plaintiff's claim to compensation rests upon his appointment by the board of supervisors, his recognition as such appointee by the judges of the court, and the rendition of services in pursuance thereof. The answer of the defendants, as interposed, contained two distinct defenses pleaded separately. The first was to the effect that the supervisors had no power to appoint, and the second put in issue the rendition of the services. They were not connected by any averment.

On plaintiff's demurrer to the first defense it was

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Opinion of the Court, by FREEDMAN, J.

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held at special term (50 *How. Pr.* 91), upon the authority of *Brennan v. Mayor, &c.* (62 *N. Y.* 365), that the naked plea of want of authority in the supervisors was, in the absence of any denial of the alleged adoption and ratification of the appointment by the court, insufficient in law to constitute a defense, but leave was granted to the defendants to amend their answer on payment of costs.

Of this privilege they did not see fit to avail themselves, nor did they appeal, and consequently the adjudication of the special term disposed of defendants' first defense.

Under the former practice, when judgment was given for the plaintiff upon his demurrer to a plea, the defendant was bound in all cases in which the judgment given was not a final one, but merely a *respondeas ouster*, to plead anew, or his default in not pleading could be entered; and though the nature and office of the demurrer have been essentially changed under the new system introduced by the Code, yet the effect of an adjudication such as has been made in this case, is very much the same as it was before. The defense which has been disposed of by the proceedings on the demurrer is no longer available.

Moreover it appears that the allegation of plaintiff's amended complaint that the several judges of the court recognized and employed the plaintiff in and about said court as an attendant, is nowhere denied in the answer, and hence it must, under the requirement of section 168 of the Code, be taken as true for the purposes of the action.

It is therefore plain that the only issue to be determined on the trial related to the rendition of the services. On this point the testimony was sufficient to authorize the direction of a verdict. Defendant's counsel did not ask to have this question submitted to the jury. True, he asked to be allowed to go to the



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Statement of the Case.

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jury on the question of recognition. But that question, as already showed, was not in issue, and having made a request for a specific purpose, for which he had no right to make it, he cannot on appeal and on a mere exception resort to it for another and different purpose (*Schroff v. Bauer*, 33 *N. Y. Superior Ct.* 199, and cases there cited).

None of defendants' exceptions being tenable, the exceptions should be overruled and judgment absolute ordered for plaintiff on the verdict, with costs.

CURTIS, Ch. J., and SANFORD, J., concurred.

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MARSHALL IBBOTSON, PLAINTIFF AND RESPONDENT, v. ALBERT KING (SUED AS ALFRED KING) IMPLEADED, ETC., DEFENDANT AND APPELLANT.

I. NEW TRIAL.

1. MOTION FOR, ON THE MINUTES, at what term to be made.

(a) At the same term at which the cause is tried.

*Special Term order* made within four days of the end of the term at which the cause was tried, *upon notice and after hearing counsel for both sides, granting leave to move for a new trial on the minutes; effect of.*

1. It does not authorize such motion after the expiration of the term at which the cause was tried.\*

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\* NOTE BY REPORTERS.—The question as to whether leave to move at a subsequent term or terms may not be granted under sections 174 and 405, does not appear to have arisen. It was not adverted to by counsel or by the court, either because it was assumed that the principle of the decisions, holding that the time to appeal could not be extended under section 174, applied to a motion for a new trial, or because the application at special term was not for leave to move at a subsequent term, and the order gave no such leave. The latter, from the views

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Statement of the Case.

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## 2. MOTION FOR ON A CASE MADE.

(a) *When and for what causes not granted.*

1. When there is a conflict of evidence on the facts submitted to the jury, and no motion is made either to dismiss the complaint on the ground that the plaintiff had failed to prove a cause of action, or for a direction to the jury to find a verdict for defendant on the ground of insufficiency of the evidence to sustain a verdict against him, a motion for a new trial on a case made will not be granted, either on the ground that the verdict is without evidence, or on the ground that it is insufficiently supported by the verdict.

1. *What cannot be questioned under these circumstances.* On such a motion the question whether the facts so submitted, even if found in plaintiff's favor, will warrant in law a verdict for him, cannot be raised if there are no exceptions sufficient to bring it before the court.

1. *The principle of the decision in Rowe v. Stephens, 34 N. Y. Superior Ct. R. p. 436, applied to a motion on a case made.*

## II. EVIDENCE.

1. *Res inter alios acta—what is not.*

- (a) SUB-AGENTS. When the defendant relies for his defense upon the character of a transaction had between a third person and the employer of an employee of his agent, in relation to a matter entrusted by the agent to his immediate employee. *A report by the employee, who had the transaction with the third party, to his employer, (being the immediate employer of the agent), at the time of handing him the proceeds of such transaction, as to what the transaction was, is admissible in favor of the third party or one claiming under him, as tending to show the circumstances under which such proceeds were accepted.*

Before SANFORD and FREEDMAN, JJ.

*Decided March 5, 1877.*

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presented by the counsel in their points, and the fact that the order simply gave leave in general terms, the term at which the cause was tried not having closed, would seem to be the real cause why the question was not raised. It seems to the reporters, however, that neither the court nor any judge thereof can give leave for the making of such a motion at any term other than that at which the cause was tried.

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Statement of the Case.

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The action was brought against the defendant as maker of a promissory note for \$360, signed Martin & Co.

The defendant denied that he was ever a partner of the firm of Martin & Co., and also pleaded usury.

At the trial, which took place May 5, 1876, testimony was given on both sides, and plaintiff had a verdict, upon which judgment was entered.

During the same term, to wit, on May 23, 1876, defendant moved, upon notice to plaintiff's attorney, at a special term, held for the hearing of motions before a judge other than the one before whom the trial was had, for a new trial on the minutes.

The court, at such special term for the hearing of motions, after hearing the defendant's attorney in support of said motion, and plaintiff's attorney in opposition, declined to entertain, and on May 23, 1876, made a special term order, which was entered on that day, whereby it was ordered "that defendant have leave to move before the justice before whom the cause was tried, for a new trial on the minutes of the trial; and in case such motion is denied, to make a case, with leave to turn the same into a bill of exceptions."

The term at which the cause was tried ended May 26. Thereafter defendant's attorney, about September 28, 1876, served on plaintiff's attorney a notice that on the above order, and the minutes of the trial of the cause, and an affidavit by defendant's attorney setting forth "that when the jury went out to consult he left the court-room for a few moments, and upon his return he found to his surprise that the jury had, during his short absence, rendered a verdict in favor of the plaintiff, and had been discharged, and the plaintiff's counsel had left the court-room, and consequently he had no opportunity to move for a new trial on the minutes," — a motion would be made at the special

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Statement of the Case.

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term of this court, before his Honor Wm. E. CURTIS (the judge before whom the cause was tried), on October 3, 1876, that a new trial be ordered on said minutes, or for such other or further order in the premises as might be just.

When the motion, initiated by this notice, came on to be heard, plaintiff's attorney read in opposition an affidavit, setting forth "that defendant appealed from the judgment to the general term on May 10, 1876, and served his proposed case July 13, 1876, amendments to which were served July 24, 1876, which amendments were accepted by defendant's failure to notice the same for settlement, as required by the rules of court; that defendant's attorney noticed a motion for a new trial herein in May, 1876, but Judge SPEIR, who was holding special term, declined to hear the same, but gave defendant leave to make his motion before Judge CURTIS, who tried the cause; that defendant neglected to make such motion before Judge CURTIS at May term."

The motion for a new trial on the minutes was denied, and an order to that effect entered October 13, 1876, and an appeal was taken from such order to the general term on October 15, 1876.

The cause came before the general term upon this appeal from the order denying the motion for a new trial on the minutes, and on the appeal from the judgment.

For the purpose of the appeal from the judgment, a case was made and settled containing the following single exception:

James R. Boyd was recalled on behalf of plaintiffs, and asked, "When you brought this money—the \$300, back to Beman, did you report any thing to him?" He answered "I did." He was then asked, "What took place?" Defendant's counsel objected, the objection

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Appellant's points.

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was overruled, and an exception taken (fol. 88 of the case). The witness answered, "Much, as I was told that Mr. Wilson had no more than \$300, and that when the note was paid the balance would be handed over to Mr. Beman."

The preceding evidence had shown that Runyon W. Martin, acting as agent for the alleged firm of Martin & Co., had given the note in suit to one Beman to get discounted for the firm of Martin & Co. Beman entrusted the note to James R. Boyd, who took it to Mr. Wilson and obtained from him \$300 thereon, and Boyd had previously testified that Wilson at the same time promised to hand over the balance when the note was paid.

*Wm. P. Lee*, attorney, and of counsel for appellant, on the points decided by the court, urged:—I. It has been intimated by the counsel for the plaintiff that he shall claim that the order denying the motion for a new trial on the minutes should be affirmed, for the reason that the motion was not made within the time required by the rules. 1. The cause was tried at the May term, 1876, and the motion was made in May. The fact that it was not finally heard until October cannot prejudice the appellant. 2. At any rate, the objection as to the time of moving for a new trial should have been taken when the motion was heard, and as a preliminary objection. This was not done, and plaintiff cannot avail himself of it here.

II. The question which was allowed by his honor the Chief Judge, was not properly allowed. The question was immaterial, as what took place between Beman and Boyd could not affect the rights of the defendant King, if he were not a partner in the firm of the makers of the note, as is claimed that he was not, nor yet could it affect the rights of the makers of the

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Opinion of the Court, by FREEDMAN, J.

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note, whoever they might be. The question, therefore, should not have been admitted.

*Daniel G. Wild*, attorney, and of counsel for respondent, on the points decided by the court, urged :—  
I. The motion for a new trial on the judge's minutes was properly denied. 1. The cause was tried in May, 1876, and a motion on the judge's minutes could only be made at the same term (*Code*, § 264). 2. The motion was not made until October, 1876. The objection that the motion was not made within the time prescribed by law, was expressly raised by the affidavit of plaintiff's attorney on the motion.

II. The exception is untenable. Beman, the witness, was acting for R. W. Martin, the agent of the defendants, Martin & Co. Boyd had been employed by Beman to get the note discounted, and the testimony objected to is the report made by Boyd to Beman of the fact that he could get \$300 on the note, and that when the note was paid, the balance could be paid over to Beman. The testimony was admissible as the acts and statements of the defendants' agent; and it was also part of the transaction itself; the defendant having claimed that the discount was usurious, it was competent to show that it was arranged through their agent, Beman, that defendants were to receive the balance of the note over \$300.

BY THE COURT.—FREEDMAN, J.—Section 264 of the Code provides that a motion for a new trial, if heard upon the minutes, can only be heard at the same term or circuit at which the trial is had. The motion, therefore, was made too late. It should have been made on a case.

But even if it had been regularly made, either in time on the minutes, or subsequently on a case, it

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Opinion of the Court, by FREEDMAN, J.

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might well, and indeed within the principles laid down in *Rowe v. Stevens* (*N. Y. Superior Ct.* 436), it should have been denied. It stated no ground upon which it was made, and, as matter of fact, no motion had been made for a nonsuit or the direction of a verdict, nor had any exception been taken to the charge of the court, under which all the issues appear to have been fully and fairly submitted to the jury.

Under these circumstances I do not feel called upon to examine the entire testimony with the view of testing the correctness of the finding of the jury.

The question was properly allowed. As the defendant claimed that the note had been usuriously discounted, it was competent and material for plaintiff to show, by way of rebuttal, what the real arrangement was; and as the whole arrangement had been made by an agent of defendant's firm, plaintiff had a right to show under what circumstances the money was handed over to, and accepted by such agent.

The judgment and order appealed from should be severally affirmed with costs.

SANFORD, J., concurred.

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Opinion of the Court, by FREEDMAN, J.

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ROBERT COCHRAN, PLAINTIFF AND RESPONDENT,  
v. CHRISTIAN GOTTWALD and DANIEL A.  
MURPHY, DEFENDANTS AND APPELLANTS.

I. COSTS — JUDGMENT FOR.\*

1. *Order of general term reversing the judgment and ordering a new trial with costs to the appellant to abide the event,—effect of, upon the costs.*

1. Respondent, on again succeeding upon the new trial, cannot include in his bill of costs as a taxable item, the amount adjudged to him for costs by the judgment reversed.

(a.) This although the reversal was for a technical error.

Before SANFORD and FREEDMAN, JJ.

*Decided March 5, 1877.*

Appeal from an order denying defendant's motion for leave to re-tax their costs.

*Spencer L. Hillier*, attorney, and of counsel for appellant, cited,—*Pennel v. Wilson*, 4 *Robt.* 610 ; *Id.*, 5 *Id.* 667 ; *Kennedy v. Harlem R. R.*, 3 *Duer*, 659 ; 4 *Bosw.* 626 ; 2 *Lans.* 97 ; *Hamilton v. Butler*, 19 *Abb.* 446 ; *North v. Sargent*, 14 *Id.* 223 ; *Goodyear v. Ogden*, 4 *Hill*, 104 ; 17 *Wend.* 50 ; 27 *Barb.* 354.

*A. J. Perry*, attorney, and *Charles Meyer*, of counsel, for respondent.

BY THE COURT.—FREEDMAN, J.—The question presented by this appeal is a very simple one, though

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\* NOTE.—See previous in this case, 40 *N. Y. Superior Ct.* 442, also 41 *Superior Ct.* 817.



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Opinion of the Court, by FREEDMAN, J.

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both parties have taken advantage of the many irregularities heretofore committed in this case, to involve it in doubt. It relates to the right of the defendants to a bill of costs amounting to \$177.77 under a judgment which has been reversed. The action was for the recovery of the possession of personal property, and the judgment awarded the possession to the defendants and assessed its value. The judgment was entered upon the report of a referee, and it was reversed by the general term for an erroneous assessment of damages, with costs to the appellant (plaintiff) to abide the event, and a new trial ordered.

Upon the second trial the defendants again prevailed, taxed their costs at \$101.19, and entered judgment not only for these costs, but also for \$177.77, the costs and disbursements taxed on the first occasion.

This judgment was, in several other respects not necessary to be mentioned here, irregular. These irregularities were corrected on plaintiff's motion, and, among other things done, the provision as to the award of the \$177.77 of costs was stricken out.

Subsequently the defendants moved at special term for leave to re-tax their costs before the clerk, which motion was denied, and from the order of denial entered thereon, the present appeal is taken.

The motion was founded upon an affidavit, and the *only* ground assigned for it, so far as the papers on this appeal show, was that inasmuch as the reversal of the first judgment was for a mere technical error of the referee, their right to the costs included in said judgment should not be impaired by it, and that hence the *whole* amount of such costs should be re-allowed *precisely* as they had once been taxed. No items were pointed out which could have been allowed on a re-taxation as just and proper ones, independently of the ground assigned for the motion, nor were the items which made up the sum of \$177.77 brought before the court.

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Opinion of the Court, by FREEDMAN, J.

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The proposition advanced by the defendants was, therefore, one which should have been urged upon the general term that adjudged the reversal, and which, whether urged or not, had certainly been determined by that tribunal against the defendants, for the decision was that the judgment should be reversed with costs to the appellant (plaintiff) to abide the event. The reversal thus adjudged carried with it a reversal of the bill of costs, the amount of which had been inserted in the judgment, and it adjudged the costs of the appeal to the plaintiff in case of final success.

After such adjudication neither the clerk nor the court at special term possessed the right to allow the defendants to tax costs for proceedings that had been vacated for error. The statutory right of a party to costs attaches only to such proceedings as are regular. The order should be affirmed with costs.

SANFORD, J., concurred.

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Statement of the Case.

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JACOB ABERLE, PLAINTIFF AND APPELLANT, v.  
JOHN HENRY FAJEN, DEFENDANT AND RES-  
PONDENT.

LANDLORD AND TENANT.

PERMISSION TO ALTER PREMISES BY REMOVAL OF PARTITIONS.

*Damages in an action for waste.*

Two questions were presented to the jury in this case:

- 1st. Whether permission had been given to the defendant to remove the partitions;
- 2nd. Whether such removal caused any, and what amount of damage.

The evidence was such that the jury *might* conclude that there was a license or permission, either in the original lease, or subsequently, from a former owner, to the defendant to make the change, which was binding upon the plaintiff or ratified or recognized by him when he came into possession, and therefore the verdict of the jury for the defendant should be sustained.

If a jury finds for a defendant when they *should have found* nominal damages for the plaintiff, it furnishes no ground for a new trial (Stevens v. Wilder, 42 N. Y. 351; Devendorf v. West, 42 Barb. 227).

The following points from opinion of FREEDMAN, J.:

This action is analogous to former actions of waste, and to sustain it plaintiff must show an injury to the freehold or reversion. The jury had a right to look beyond the evidence as to the cost of restoration. Alterations of this kind are not necessarily acts of waste. They may be in some instances, and as was claimed by the defendant in this case, a benefit to the estate. The case having been submitted to the jury by the trial judge more favorably to the plaintiff than he was entitled to, the controversy should not be re-opened.

Before CURTIS, Ch. J., SANFORD and FREEDMAN, JJ..

*Decided May 8, 1877.*

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Appellant's points.

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Appeal by the plaintiff from a judgment entered upon a verdict in defendant's favor, and from an order denying a motion for a new trial.

The action is to recover damages for the removal of two partitions in the rear of a store, eight feet eight inches wide, occupied by the defendant as a tenant under a letting from a former owner, and converting the materials. The defendant answers that such acts were by plaintiff's consent and permission, and were a benefit to the building and the plaintiff.

*Simon Sultan*, for appellant.—I. The first request to charge was not embraced in the charge of the court to the jury, and was improperly refused. The charge confined itself in general terms to the question whether there had been a permanent injury to the entire structure, of which the defendant merely held a part. The question really was whether there had been a permanent injury to the premises demised, and whether there was such injury as to the plaintiff. If there was, the plaintiff was entitled to a verdict (See *Nottingham v. Osgood*, reported in note in *Sedgwick on Damages*, 6th ed. 167). The request was to charge what the defendant's rights were under the lease, and that the removal of partitions or the alteration of the premises to something different from what they were, are not such rights. The court, however, only charged "that the building was the inheritance which the owner had a right to have." A proposition entirely disconnected from the propositions contained in the request (*Douglass v. Wiggins*, 1 *Johns. Ch.* 435; 1 *Addison on Torts*, Am. ed. 280; 2 *Edm. Rev. St.* 344; *McGregor v. Brown*, 10 *N. Y.* 114).

II. The learned judge erred in submitting to the jury the question whether the injury affected the plaintiff's freehold permanently. 1. The evidence is undis-

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Appellant's points.

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puted that the partitions were affixed inseparably to the land and were a part of the freehold, and all the material composing the same had been destroyed with the exception of the doors. Defendant could not restore these partitions, he could at most replace them with others of perhaps similar, perhaps inferior material. Here was therefore a permanent injury to the reversionary estate of the plaintiff in the very act of destruction (*Voorhees v. McGinnis*, 48 *N. Y.* 278). 2. The act of the defendant being therefore an injury *per se*, it was not to be determined by the jury, it was a question of law for the court, not of fact for the jury (*McGregor v. Brown*, 10 *N. Y.* 117).

III. The verdict was clearly against the evidence and the charge and direction of the court. 1. The theory upon which the case was submitted to the jury was that a wrong had been committed by the defendant, for which he was to answer in damages. Two things were required to be done by the jury. 1st. Assess the damages for the simple wrong. 2nd. Instruct the court upon the evidence by finding upon the question whether the wrong was a lasting injury to the freehold. 2. The charge was substantially the direction of a verdict for the plaintiff, and imposed the simple duty to assess damages, according to the measure stated by the court. 3. Instead of doing as directed, the jury returned a verdict of no damages, disregarding the evidence of damage entirely, as well as the instruction of the court, or in other words, answered the simple question how much it would cost to restore the partitions, that it would cost nothing.

IV. The verdict being clearly against the law, and contrary to the charges and direction of the court and against the evidence, should have been set aside. 1. A verdict is always set aside when it is contrary to the charge of the court (*Jacobsohn v. Belmont*, 7 *Bosw.* 14; *Ayres v. O'Farrell*, 4 *Roberts*, 668; *Clark v.*

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Respondent's points.

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Richards, 3 *E. D. Smith*, 89). 2. So when there is no evidence to sustain it (*Rathbone v. Stanton*, 6 *Barb.* 141).

*Charles H. Bailey*, for respondent.—I. A landlord or reversioner cannot recover against his own tenant, lawfully in possession, for altering the condition of the leasehold premises, on any other ground than that of waste (*Livingston v. Hayward*, 11 *Johns.* 429; *Livingston v. Mott*, 2 *Wend.* 605). To sustain this action he must show an injury to the freehold or reversion; in other words, an injury to his own estate (*Addison on Torts*, 309–312). The English law of waste, though stricter than our own, has not gone further than to declare that substantial alterations in the form and arrangement of a house, *so that it is no longer the same house*, is *per se* an invasion of the proprietary rights of the landlord or reversioner. Such would seem to be the law here also; and the illustration of the doctrine furnished by a case, is the changing of a dwelling-house into a warehouse (*Douglas v. Wiggins*, 1 *Johns. Ch.* 435). Alterations of a less extent are not necessarily acts of waste. Accordingly, it has been held in England, that where a lessee opened a new door in a house, whereby the house was not in any respect weakened or injured, it was a question for the jury, whether there was or not *any injury* to the rights of the reversioner (*Young v. Spencer*, 10 *B. & C.* 145). In our own courts also, the question in such cases has been made to turn on the point of damage or no damage. “The very term waste,” says Justice MARCY, “implies the idea of detriment to the landlord or reversioner. Without damage, it would seem there could be no waste” (*Jackson v. Tibbitts*, 3 *Wend.* 341; *Addison on Torts*, 280 note [m]). “If the plaintiff complains of the removal of doors and partitions in the house, he must show that the alterations

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made were of a permanent character, making a real change in the form and arrangement of the building, or that they deteriorated the property" (*Addison on Torts*, 313).

II. It is not denied there may be acts on the part of the tenant, which imply damage to the freehold, and are *per se* acts of waste ; such as cutting down timber or ornamental trees, taking down buildings or completely changing their character, converting a furze brake kept for game into pasture land, &c., &c. But minor alterations made by the tenant of a building occupied by him, in order to make it more convenient or useful in respect of the very purposes for which it was designed and let, are not in themselves waste. To be so they must be injurious to the freehold ; and whether or not they are so injurious is a question of fact for the jury.

III. In this case the question was so submitted with remarks more favorable to the plaintiff than he was entitled to, and the jury have found for the defendant. The evidence fully sustains the verdict.

IV. A new trial will not be granted on the ground that the verdict is against the weight of evidence, or contrary to the law and evidence, except on condition of payment of the costs incurred ; and where the court can see that such costs will probably equal or exceed the damages which the plaintiff may recover, a new trial will be refused (*Graham on New Trials*, 603 ; *Exp. Bailey*, 2 Cow. 479).

BY THE COURT.—CURTIS, Ch. J.—There was a conflict of testimony between the witnesses, as to whether the replacing of the partitions, and the restoration of the building to its former condition, would cost \$35 or \$90. The defendant claimed that his change was a benefit to the plaintiff.

Henry Immen, from whom the plaintiff received a

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deed of the building April 25, 1874, testified that about February, 1874, he let the premises to the defendant, who had possession under the lease when the building was conveyed to the plaintiff, and has since continued in such possession. He also states, that he, while owner, gave the defendant permission to remove the partitions in question. The lease is not in evidence, or shown to have been reduced to writing, and it is not clear from the case whether this permission was a provision of the original lease, or subsequently granted. But there is no question raised, as to the fact of such permission being granted by Mr. Immen, and that the defendant told the plaintiff about May 1 or 2, 1874, that he was about to remove the partitions, and that the plaintiff did not when thus informed in such conversation with the defendant, raise any objection to his doing so. The defendant removed the partitions about a week after this, the same evening that he was previously told by the witness Petty, that plaintiff desired him not to remove them until he had seen him. The defendant testified that he "had nothing to do with Petty," and appears not to have recognized him or known him as authorized by the plaintiff to act in the matter.

The questions arising upon the issues were passed upon by the jury, under a charge which affords no ground for complaint or exception on the part of the plaintiff.

It is evident the court, in its charge, viewed the question of damages, as one where the jury were to assess the amount between \$35 and \$90, or to determine whether these amounts were exaggerated. There were two questions presented to the jury by the evidence for their consideration. The first, was whether permission had been given to the defendant to remove the partitions, and the second was whether such removal caused any damage.



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Concurring opinion of FREEDMAN, J.

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The evidence was such, that the jury might conclude that there was a license either in the lease, or subsequently from the former owner to the defendant, to make the change, which was binding upon the plaintiff as a subsequent grantee or recognized or ratified by the plaintiff when he came into possession. This permission was distinctly shown by the former owner, when he testified as to the letting, and without objection.

The evidence is not of a character to call for the granting of a new trial, on the ground that no damages were found by the jury. The damages, if any, were trifling, and in a suit brought where the costs are much greater than the pecuniary amount involved in the controversy, the court cannot entirely overlook the maxim *De minimis non curat lex* (*Exp. Baily, 2 Cow. 479*).

The questions of fact were within the province solely of the jury, and the judge did not err in denying the defendant's motion to set aside the verdict on the ground that it was in conflict with the charge and the evidence.

The jury had a right, in determining the question of damages, to look beyond the mere evidence of the cost of restoration. If they found for the defendant, when they should have found nominal damages for the plaintiff, it would furnish no ground for a new trial (*Stevens v. Wilder, 42 N. Y. 351; Devendorf v. Wert, 42 Barb. 227*).

The judgment and the order denying the plaintiff's motion for a new trial appealed from, should be affirmed.

SANFORD, J., concurred.

FREEDMAN, J. (Concurring).—The defendant was lawfully in possession of the premises under a lease *which had not expired*. The action to recover dam-

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Concurring opinion of FREEDMAN, J.

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ages for the removal of the partitions was therefore analogous to the former action for waste. To sustain such action, plaintiff must show an injury to freehold or reversion, or, in other words, to his own estate.

There was evidence that should have been submitted to the jury, upon which the jury might have found a license. But that question was not submitted to them, the court holding, in effect, but erroneously, in my judgment, that, as matter of law, no license had been shown.

The case was submitted to the jury on the theory that the plaintiff was under all circumstances entitled to some damages. They were instructed that, if the act complained of constituted a single trespass, which did not injure the building permanently, the plaintiff was to be paid just simple damages. If, on the contrary, it affected the building permanently, then the court might treble the damages as found by the jury.

As to the damages to be found they were charged as follows :

“ Now, in order to come to a conclusion of what the plain, simple damage had been in the removal of these partitions, you will take into consideration the plaintiff's witnesses. They have given you the damage in the neighborhood of \$90. Then you have to turn and look at the defendant's witnesses, and they have given you \$35 or \$36. It is for you to say which of these are right, and it is your province to say that both are exaggerated,—on the one hand too much, and on the other too little.”

And finally they were told to render a separate answer, either in the affirmative or negative, as to whether or not the removal of the partitions caused permanent or lasting damage.

The jury found that no damage whatever had been sustained, and they rendered a verdict for defendant.

This verdict was to some extent against the charge

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of the court, but I am not prepared to say that it was against evidence. The sum of \$90, named by plaintiff's witnesses, and the sum of \$35 or \$36, named by defendant's witnesses, represented their respective opinions as to the cost of the restoration of the partitions. But the jury, in determining the question of damages, had a right to look beyond the evidence of the cost of restoration. Alterations are not necessarily acts of waste. In some instances they may even be, as is claimed by the defendant to have been in this case, a benefit to the estate. Nor did the plaintiff claim to recover for the mere value of the materials which had composed the partitions.

Inasmuch, therefore, as the manner in which the case was submitted to the jury was more favorable to the plaintiff than he was entitled to, and the jury, notwithstanding such fact, have found that he sustained no injury, the controversy should not be reopened. The trial judge seems to have entertained the same view, for he denied plaintiff's motion to set aside the verdict and for a new trial.

For the foregoing reasons, the judgment and order should be affirmed, with costs.

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WILLIAM A. LEONARD, PLAINTIFF AND APPELLANT, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, DEFENDANT AND RESPONDENT.

RAILROAD COMPANIES, THEIR DUTIES AND RESPONSIBILITIES.

NEGLIGENCE; WHEN THE QUESTION OF, SHOULD BE SUBMITTED TO THE JURY.

Although the general rule is that a person approaching a

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railroad crossing should use both eyes and ears to discover and avoid an approaching train, there may be circumstances, or a state of facts, existing in some cases, where the most vigilant exercise of these organs will fail to warn and protect him, and in such cases the law does not charge a person with contributory negligence.

*E. g.*, the present case, where another long train of cars was passing in an opposite direction, and making a great noise, tending to show that if the bell of the train by which the injury was committed had been rung, the person injured could not have heard it.

Other instances: As where the noise was caused by a wagon, or by a steam saw-mill, or by falling water, or by another train (*Davis v. N. Y. C. & H. R. R. Co.*, 47 *N. Y.* 403; *Richardson v. Same*, 43 *Id.* 849; *Ingersoll v. Same*, 6 *N. Y. Supreme Court* [T. & C.] 416).

In cases like the present one, the law requires the exercise of such a degree of care as *prudent persons*, knowing the danger to be encountered, and giving attention to their safety, *would use* to shield themselves from danger, and the question whether a person crossing a railroad track is negligent in not looking or listening for an approaching train, and whether he could have stopped in time to avoid the danger, are questions for submission to the jury (*Weber v. N. Y. C. & H. R. R. Co.*, 3 *N. Y. Weekly Dig.* 472; and the case of *Schatter v. Gardiner*, 47 *N. Y.* 402, cited therein).

In this class of cases, when the conduct of the plaintiff is mixed with, and dependent upon, the acts of the defendant, and upon the surrounding circumstances, the questions of negligence fairly belong to the jury, in its general consideration of the whole facts of the case, and should be submitted to them (Cases referred to in support of this point: *Borst v. L. S. & M. S. R. Co.*, 4 *Hun*, 340, affirmed by court of appeals, June, 1876; *Thurber v. Harlem B. & F. R. R. Co.*, 60 *N. Y.* 331; *Ingersoll v. N. Y. C. & H. R. R. Co.*, 6 *N. Y. Supreme Court*, 419). The effect of these last decisions cited is not wholly in accordance with the rulings of this court in *Sutherland v. N. Y. C. & H. R. R. Co.*, 41 *N. Y. Superior Court* (9 *J. & S.*) 17. *Held*, that in this case, the questions of negligence were pure questions of fact, that should have been submitted to the jury.

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A railroad company operating trains upon a road owned by another company, is liable for negligence in running its trains thereon, and for the negligence of the flagmen stationed at the crossings, and for other servants or employees engaged in the signal service of that road. It is immaterial, so far as the public or the person injured is concerned, to whom the road or its signal service or other appurtenances that are in use at a crossing belong. The duty *that there shall be no negligence in the premises* devolves and rests upon the company running the trains by which a person is injured (Michigan Central R. R. Co. v. Kunonn, 39 *Ill.* 272; Clement v. Canfield, 23 *Vt.* 302; Wyman v. P. & K. R. Co., 46 *Maine*, 162; Webb v. Same, 57 *Id.* 117).

Before CURTIS, Ch. J., and SANFORD, J.

*Decided May 8, 1877.*

This was an appeal from an order denying a motion made at the special term on a case for a new trial.

This action was brought for the recovery of \$50,000 damages against the defendant for injuries sustained by the plaintiff, in being run over by defendant's cars, on June 17, 1874, at the corner of Fifty-seventh street and Fourth avenue, in the city of New York.

The answer admits the incorporation of defendants, denies the remaining allegations of the complaint, and alleges contributive negligence on the part of the plaintiff.

At the time of the injury, parties were engaged in sinking the railroad tracks through Fourth avenue in that city, and for that purpose had removed the tracks from the position formerly occupied in the center of the Fourth avenue, and placed them upon the extreme west side of the avenue, the western track being in fact, upon the west sidewalk, and the other occupying a position in the avenue close to the curb.

The excavation of the avenue progressed in sections,

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and at the time in question, one excavation commenced north of Fifty-seventh street, and extended southerly about half the block between Fifty-seventh and Fifty-sixth streets.

This excavation was some fifty feet wide, and over it at Fifty-seventh street had been thrown a flat temporary bridge to allow the public to cross the avenue during the improvement.

The bridge was just long enough to span the excavation, and its west end lapped upon the bank and came within thirty-two inches of the east railroad track.

The material taken from the excavation was piled up to a considerable height around it, and that taken from the excavation above Fifty-seventh street had been piled in the avenue below Fifty-seventh street to such an extent that commencing at the south end of the excavation half way between Fifty-seventh and Fifty-sixth streets, the pile filled all the space of the avenue between the curb on the east side and the east track of the railroad on the west line of the avenue, and rose to the height of some fifteen feet, and extended southerly two or three blocks, and the space between the east track and the excavation was entirely filled up to the bridge, so that a person standing upon the bridge even on the west end of it could not see a train coming up on the easterly track.

A railroad flagman, whose station-house was at the northwest corner, was employed to guard that street intersection, and to signal trains passing on the tracks, and teams, and persons desiring to cross the avenue. At the time of the accident the plaintiff was the publisher of a journal called the Time Table, and was living east of the Fourth avenue at the corner of Lexington avenue and Fifty-eighth street, and was crossing through Fifty-seventh street intending to stop at the defendant's Grand Central Depot, to ascertain if any change was contemplated by the defendant in

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running its trains. He was in the habit of crossing the Fourth avenue almost daily, and knew the position of the tracks.

Before reaching the bridge the plaintiff saw a train some distance above coming down from the north on the west track, and when he reached the bridge he intended crossing the tracks in advance of such train, and had time in which to do so, as he thought, but he was stopped at the west end of the bridge by the flagman, who signalled him to stop.

The flagman then occupied a position in the middle of Fifty-seventh street just west of the west track, and was signalling this incoming train to some teams which were approaching, and when he saw plaintiff upon the bridge he signalled him personally to stop, and he did so at once, at the west end of the bridge.

After stopping the plaintiff, the flagman turned his face northward towards the train approaching from that direction, and waved his flag in the usual manner, and as the train approached stepped upon the track in front of it and remained there a few moments, and as the train neared him stepped off the track in an oblique northeasterly direction, which brought him between the easterly and westerly tracks where he remained waving his flag till that train had passed, when he ceased all signals to the plaintiff, lowered his flag, and started off, trailing his flag on the ground.

The plaintiff was watching both the train (from the north) and the flagman, and when he saw the first pass, and the latter cease his signals and trail his flag, he stepped from the bridge towards the track looking straightforward, and was instantly struck by the defendant's train, that was going north from the depot on the easterly track, and thrown thirty feet into the rocks, in the excavation north of Fifty-seventh street, receiving wounds and fractures permanently impairing his sight, hearing, and health. This train, by reason of

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the embankments and obstructions could not be, and was not previously seen by the plaintiff.

The flagman did not signal the train from the south, and apparently did not discover its approach, any more than the plaintiff, although from the flagman's position he could have seen it if he had turned his face in that direction.

There is no proof that the engineer of the southern train either rung his bell or blew his whistle, although it is possible had he done both, the sound would have been drowned in the noise of the northern train, which was very long and made a great deal of noise.

On these facts, the court nonsuited the plaintiff, and denied plaintiff's motion to allow the case to go to the jury, to which decision and refusal the plaintiff duly excepted.

The plaintiff moved for a new trial at special term upon a case and exceptions, and from the order denying such motion appeals to the general term.

*De Witt C. Brown* (*Edward Gebhard*, attorney),  
of counsel, for appellant.

*Frank Loomis*, for respondent.

BY THE COURT.—CURTIS, Ch. J.—Though the court of appeals have held that every person approaching a railroad crossing should use both eyes and ears to discover any approaching train, there may be circumstances where the most vigilant use of these organs will fail to warn and protect.

The evidence in the present case shows that the plaintiff could not, in consequence of embankments and obstructions, see up or down the track, until he stepped on to it, between two and three feet from the west end of the bridge. There was no opportunity for him to look until he emerged from between the ob-



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structions on to the track, and as he was in the act of so stepping forward, looking before him, he was struck and thrown into the excavation. No exercise of prudence would have enabled him to have looked up and down the track. In looking forward, as he stepped forward, he exercised such care as a prudent man ordinarily would exercise under these circumstances. To have looked into the embankments to the right and to the left as he stepped from the passage-way between them on to the track, would have been useless and imprudent.

The testimony also shows that the train of cars that was coming in from the north at that time, was a very long one, and made a very loud noise, and though there is no evidence that a bell was rung on the defendant's train, the proof strongly tends to show, that even if it had been rung, the plaintiff could not have heard it. The law in a case like this does not charge a person with contributory negligence, where the surrounding and external circumstances are such that the senses of sight and hearing cannot be exercised. There are many instances in which these circumstances, as for example, the noise caused by a wagon, or by a steam saw-mill, or by falling waters, or by another train, have been recognized by the courts as a sufficient excuse for not hearing an approaching train (*Davis v. N. Y. C. & H. R. R. R. Co.*, 47 *N. Y.* 403 ; *Richardson v. Same*, 45 *Id.* 849 ; *Ingersoll v. Same*, 6 *N. Y. Supreme Court [T. & C.]* 416).

In the recent case in the court of appeals of *Weber v. N. R. C. & H. R. R. R. Co.* (*N. Y. Weekly Dig.* 472), it is held that the law requires, in cases like the present, the exercise of such a degree of care as prudent persons knowing the danger to be encountered and giving attention to their safety would use to shield themselves from danger therefrom, and that the questions whether a person crossing a track is negligent in

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not looking or listening while he is on the crossing, and whether he could have stopped in time to avoid the danger, are questions for the jury. The case of *Schattler v. Gardiner*, 47 *N. Y.* 402, is cited in the opinion in support of this ruling. In this latter case, where there were also obstructions to seeing and hearing, GROVER, J., says: "These questions upon the evidence should have been submitted to the jury." The doctrine, that these questions of negligence in this class of cases, where the conduct of the plaintiff is mixed with and dependent upon the acts of the defendant and the surrounding circumstances, in most cases fairly belong to the jury in its general consideration of the whole facts of the case, is sustained in *Borst v. L. S. & M. S. R. Co.*, 4 *Hun*, 349, affirmed by court of appeals, June, 1876. The same was also held in *Thurber v. Harlem B. & F. R. R. Co.*, 60 *N. Y.* 331. In a case similar to the present, it was held that the evidence of obstructions to the sight and hearing of the approaching traveler at the crossing, made his alleged negligence a question for the jury and their decision upon it final (*Ingersoll v. N. Y. C. & H. R. R. R. Co.*, 6 *N. Y. Supreme Ct.* 419).

The effect of these decisions is not wholly in accordance with the rulings in *Sutherland v. N. Y. C. & H. R. R. Co.*, 40 *N. Y. Superior Ct.* (9 *J. & S.* 17), which the defendant cites to sustain the dismissal of the complaint in the case under consideration.

In addition to these obstructions to sight and hearing, as bearing upon the question of the plaintiffs negligence, there were other facts shown on the trial of the case, which were also proper to go to the jury in its general consideration of the whole facts.

The evidence shows, that the defendant was running its train at the intersection of the Fourth avenue and Fifty-seventh street, two thoroughfares in the heart of a great city, at a rate of speed that threw the plaintiff thirty feet when he was struck by it; and the witness

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Ressiga, who resided in the immediate vicinity, testified "There were a great many accidents occurred there every day, and I don't know whether I saw this particular one." It also appears that the plaintiff crossed there almost daily, and must have been conversant with the tracks and the service signals of the road, and that he was watchful and obeyed the danger signal of the flagman, when signalled to stop, and proceeded on when the signal was lowered, after the train from the north passed. All these facts tend to enlighten the minds of the jury in passing upon the questions of negligence, which in this case are pure questions of fact.

It is true, the defendant insists that it is not shown, that it was their flagman, or their road, but it admits that the train was operated by it, which inflicted the injuries upon the plaintiff.

There is no good reason why a railroad company, operating trains upon a road owned by another company, should not be liable for negligence in running its trains. The exigencies of the protection of the public require that it should be amenable to the same laws and regulations that bind the owner, and the courts have so held (*McGrath v. N. Y. C. & H. R. R. R. Co.*, 63 *N. Y.* 522).

If the defendant operated this train on a road belonging to another company, and subject to the protection and signalling of this flagman, both as respects itself and the public at this crossing, it should be responsible for his negligence, for the same reason that it is protected by his care from liability, when persons cross the track, negligently disregarding his signals.

When various companies run trains over the same road in a large city intersected by the crossings of streets, the protection of citizens in the use of the streets should not depend upon inquiries to be made of the signalling flagmen of the road, as to which company

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employs them, or whether they are duly authorized to signal danger or safety as this or that train passes. It must be assumed in such exigencies, that when a company chooses to run trains over a road guarded by flagmen, that it elects to be protected by these flagmen properly discharging their duties, and to be made liable in case they neglect them. No conflicting view would be consistent with safety, either to themselves or the public. The law does not give immunity from liability to a company operating its trains negligently, because it appears that it operates them upon a road and with a signal service that belongs to another company. As far as the person injured in passing over the crossing by such company's train is concerned, it is immaterial to whom the road or its signal service or its other appurtenances belong that are in use at that crossing. The duty primarily devolves upon the company running the train, that there shall be no negligence in respects to these matters as far as persons crossing are affected (*Michigan Central v. Kanouse*, 39 *Ill.* 272; *Clemont v. Canfield*, 28 *Verm.* 302; *Wyman v. P. & K. R.*, 43 *Maine*, 162; *Webb v. Same*, 56 *Maine*, 117). It is apparent that without having a flagman at this intersection in question, the defendant was guilty of negligence in running a train at the rate of speed this was run, which struck the plaintiff, and even with a flagman it is questionable if the defendant was justified in running it at so high a rate of speed in a locality, when this class of accidents was of such frequent occurrence.

In *Borst v. Lake S. & M. S. R. Co.* (4 *Hun*, 349), it is held, that when a person waiting for an opportunity to cross the track is signalled by a flagman stationed at the crossing, he has a right to rely on the flagman, and to suppose that he has performed his duty.

The evidence on the part of the plaintiff was sufficient to warrant the submission of the case to the jury,

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and the order appealed from dismissing the complaint should be reversed, and a new trial granted with costs to abide the event.

SANFORD, J., concurred.

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THOMAS M. TYNG, PLAINTIFF AND APPELLANT, v.  
LUTHER R. MARSH, *et al.*, DEFENDANTS AND  
RESPONDENTS.

PRACTICE; RULES OF COURT.

ENFORCEMENT BY ORDER.

*Rule 10 of this court and 44 of general rules.*

The rules of the courts seek to secure cases and exceptions properly settled and definitely determined, as to their form and contents, before coming before the appellate courts for consideration, and to give all parties opportunity to have the questions brought up fairly and accurately for review.

If a party appellant, prints, files and serves a case that is not the case as settled, a wrong is committed, and it is a necessary incident to the powers and jurisdiction of a court in the administration of justice, that it should have control over its files and records, to prevent their use wrongfully. And such control can be enforced by order as in this case, in conformity with rules 10 and 44.

The authority and force of these rules was provided for in section 470 of the Code, and in *Laws of 1870*, chapter 408, section 13. When the statutes or the rules of the courts do not cover a case, the rules of the court of king's bench are followed (*Dubois v. Phillips*, 5 *Johns.* 235; Rule 97).

Before CURTIS, Ch. J., and SANFORD, J.

*Decided May 8, 1877.*

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Opinion of the Court, by CURTIS, Ch. J.

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Appeal from an order made May 24, 1876, at the special term, that the plaintiff's printed case be ordered off the files of the court, and that his case and exceptions be deemed abandoned, because not filed within the time, and as required by the rules, and practice, and order of the court.

*Robert L. Fowler*, for appellant.

*Wm. F. Shepard*, for respondents.

BY THE COURT.—CURTIS, Ch. J.—Previous to the making of the order appealed from, the plaintiff was by order required to file his case as settled, within a certain time, or that it should be deemed abandoned. The order also required that he should procure the case as settled to be engrossed or printed.

The plaintiff has printed, filed and served a case, in which he has omitted to insert certain exhibits that were in the case as settled, and which is in other respects a departure from the case as settled.

The defendants charge that the omitted exhibits are documents made by the plaintiff, and are material in the action, both as contradicting the plaintiff's oral testimony, and on the general questions of the case, and that they were offered in evidence by the defendants, and they aver, that they believe such omission was intentional on his part.

The plaintiff responds to this, by saying that he understood that the exhibits which were not printed in the case were omitted in accordance with the defendants' stipulation. If the plaintiff thus misunderstood this stipulation and was misled, he should have applied without delay by motion to the court for relief, and for leave to correct the case as printed, served and filed.

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Opinion of the Court, by CURTIS, Ch. J.

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The chief point that the plaintiff urges is, that the special term had no power to declare the case and exceptions abandoned, or to order the printed case off the file.

The rules of the courts seek to have cases and exceptions settled and definitely determined, as to their form and contents, before coming before the appellate courts for consideration, and also to give all parties an opportunity to have the questions brought up fairly and accurately for review. If a party appellant chooses to print, file and serve a case, that is not the case as settled, it is obvious that a wrong is committed. It is a necessary incident to the administration of justice, that a court should have control over its files, so far as to prevent their use thus wrongfully, and as is here claimed in bad faith, to prejudice a party in a suit.

The order that the case and exceptions be deemed abandoned is in conformity with the 44th rule. The authority and force of these rules in governing matters before the courts was provided for in section 470 of the Code, and in section 13, chapter 408, of the *Laws of 1870*. Where the statutes or their rules do not cover a case, the courts follow the rules of the king's bench. (*Dubois v. Philips*, 5 *Johns.* 235; Rule 97). The order appealed from gives effect to the order of March 29, 1876, which, not having been complied with, or appealed from, became operative upon such non-compliance.

The papers on the appeal do not sustain the claim of the appellant, that the defendants' objections are technical and unsubstantial, or that he offered to remedy the discrepancy between the printed case and the case as settled at any time before the defendants made this motion.

The order appealed from should be affirmed with costs.

SANFORD, J., concurred.

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Statement of the Case.

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WILLIAM S. KEILEY, AS RECEIVER, &C., PLAINTIFF  
AND RESPONDENT, v. CHARLES DUSENBURY,  
IMPLEADED, &C., DEFENDANT AND APPELLANT.

RECEIVER, &C., ASSIGNEE FOR THE BENEFIT OF CREDITORS, &C.  
—SUCCESSOR TO, HOW APPOINTED.—MONEY PAID INTO COURT,  
PROTECTION OF.—EFFECT OF WRONGFUL PAYMENT.—PARTIES  
RECOVERING THE SAME, ACQUIRE NO TITLE THERETO.—TRIAL  
BY JURY, WAIVER OF.

Money paid into court and held in its custody, is a deposit of such a character that it is a stringent duty of the court and all its officers to protect the same by all the lawful means within their power, from fraudulent diversion or misapplication.

When a wrongful payment of money, in the custody of the court, has been procured by collusion or by fraudulent concealment or false representations, the parties to such acts, or those profiting thereby and obtaining the money, acquire no legal title to the same, and the person rightfully entitled thereto has his remedy by action to recover the money, &c., and in some cases, by proceeding summarily against the wrongdoers.

The recitals in an *ex parte* order (directing the custodian of the money to pay the same), as to who is or who appears to be the person entitled to the same, do not protect the wrongful recipient of the fund from liability for the same to the person rightfully entitled to it, when the order has been procured by collusion or fraud practiced upon the court.

Such an order has none of the elements to constitute a bar, as *res adjudicata* against the lawful claimant.

The resignation of an assignee for the benefit of creditors must be made to the supreme court. Its acceptance and the discharge of the assignee from the trust, and the appointment of his successor, are all matters for the action of said court (1 R. S. 730, §§ 69, 70, 71; Leggett v. Hunter, 19 N. Y. 459; Cruger v. Halliday, 11 Paige, 819; Thatcher v. Canda, 3 Keyes, 157).

The property and trusts created by such an assignment cannot be transferred by the resignation of the trustee in favor



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- of some one else, *unaccompanied* with the consent of the *cestuis que trust* or the order of the supreme court.

A receiver is clothed with no powers to waive the equitable rights of the judgment creditors, for the protection of whom he was appointed.

Where a party proceeds to a trial before the court without a jury, and without objection or a demand for a trial by jury, he must be deemed to have waived his right to a trial by a jury, if any he had (*Black v. White*, 37 *N. Y. Superior Reports*, 320).

Before CURTIS, Ch. J., and SANFORD, J.

*Decided May 8, 1877.*

This is an appeal by the defendant Dusenbury, from a judgment entered against him personally, for \$3,076.50.

It appeared at the trial, that on January 24, 1857, Peter Morris, John A. Morris, and James Cumming, became and ever since have remained, judgment creditors of Selah Hiler, one of the defendants, and that on November 7, 1873, by the order of the supreme court in a proceeding then pending, this defendant, Selah Hiler, became entitled to a certain fund or sum of \$7,187, in the custody of the chamberlain of the city of New York, to be drawn out only upon the order of the court of common pleas.

It further appeared that on November 7, 1872, an instrument purporting to be an assignment of this fund to one George W. Haight for the benefit of certain creditors, was executed by the defendant Selah Hiler.

Upon application of the above named judgment creditors, who are not named in this assignment, the plaintiff, on December 19, 1873, was duly appointed receiver of all the debts, property, equitable interests, and things in action of the defendant Hiler, with leave to sue for and recover any of his estate. The plaintiff duly qualified as such receiver, and has taken the steps

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necessary to vest in himself as such receiver all the title and estate of Hiler to this fund of \$7,187, which Hiler had on December 19, 1873.

On or about January 8, 1874, this fund of \$7,187 came into the hands of the defendant, Dusenbury, with notice that the judgment creditors above named claimed the whole or a part of the fund, and with knowledge that the plaintiff was appointed such receiver, with leave to sue for and recover this money.

The testimony in the case does not show that Dusenbury received any direct assignment of this fund or the title thereto from any one, but he claims that his position is that of an assignee under the assignment from Hiler to Haight, by the resignation of the latter in his favor. It appears from the testimony of Dusenbury himself that he received the entire fund or sum of \$7,187, and there is no evidence that he has parted with any considerable portion thereof, except the sum of \$1,000 to the defendant, Sackett.

There is no evidence that the persons named in the alleged assignment assented to the removal or resignation of Haight, and there is testimony that one of them did not so assent.

This action is brought by the receiver to have that assignment set aside as void and fraudulent as against these judgment creditors, and that the defendants other than the chamberlain be made liable for the money received by each respectively.

In October, 1873, Hiler was served with an order for his examination, and was examined at various times as a judgment debtor thereunder down to December 19, 1873, when the plaintiff was appointed receiver.

On December 13, 1875, the defendant Hiler, while still forbidden to dispose of his property, and more than a year after he had executed the alleged assignment covering the fund to the defendant, Haight, obtained by S. H. Randall, Esq., his attorney, an abso-

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lute order, *ex parte*, commanding the chamberlain to pay this fund to Hiler himself. On the same day, and before the money could be drawn from the chamberlain by Hiler, the judgment creditors and real parties plaintiff in interest herein obtained an order to examine the chamberlain, and among other things forbidding the chamberlain to pay this money over to the defendant Hiler.

On December 15, 1873, the defendant Dusenbury claimed this fund by S. H. Randall, Esq., the same attorney who two days before had obtained the order directing the chamberlain to pay this fund to the defendant Hiler, and the same day he obtained an order to show cause why the order restraining the chamberlain from paying said fund to Hiler or his order or to the defendant Charles Dusenbury, trustee, should not be vacated. This was obtained in part upon the affidavit of Dusenbury, saying he learned on December 13, that the attorney for the plaintiffs (the judgment creditors herein), had obtained a stay restraining the chamberlain from paying over the fund, which Dusenbury prays may be vacated. An affidavit of Mr. Randall was read on this application, stating he had been the attorney for the trustee Haight, under the assignment, from May, 1873, and that he was now the attorney for Dusenbury as trustee in whose favor Haight had resigned.

Upon that motion the defendant Dusenbury sought a determination as between the judgment creditors and himself, as to the title to the fund in controversy, and his motion to allow the money to be paid to himself as trustee, was denied with costs, December 23, 1873, and the order denying it was served on Dusenbury's attorney the same day.

The defendant Dusenbury appeared and opposed the motion of the judgment creditors for the appointment of a receiver, and filed his own affidavit, and the

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papers showing his alleged title to this fund in opposition, but the motion was granted, and the order continued the injunction restraining Hiler and his servants, agents and attorneys from interfering with this or any property of Hiler's.

On January 7, 1874, the defendant Dusenbury, acting through his attorney, S. H. Randall, Esq., obtained an *ex parte* order from the court of common pleas directing the city chamberlain to pay over this fund to himself. Under this last mentioned order, the chamberlain paid the fund to Mr. Randall, who at once paid it to his client.

In applying for this order for the chamberlain to pay over the fund, the existence of the order of December 13, 1873, restraining the chamberlain from so paying it, and also the existence of the order of December 23, denying Dusenbury's motion to allow the fund to be paid to himself, was not disclosed to the court.

On the trial at special term the court found that the alleged assignment from Hiler to Haight was made with intent to hinder, delay, and defraud the creditors, of the assignor Hiler, and these judgment creditors, Morris, Cummings and Morris, and that it was fraudulent and void; and that the defendant Dusenbury never became vested with the title of the money received by him, as alleged trustee, from the city chamberlain; but wrongfully and fraudulently procured possession of the same, and that the plaintiff, as receiver, was entitled to a judgment against the defendant Dusenbury for the amount of the judgment, in favor of the judgment creditors Morris, Cummings and Morris, against Hiler, with interest thereon and costs.

From this judgment the defendant Dusenbury appeals.

*Hall & Blandy*, attorneys for appellant; *Ira D. Warren*, of counsel.

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Opinion of the Court, by CURTIS, Ch. J.

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*L. A. Gould*, attorney for respondent; *D. M. Porter*, of counsel.

BY THE COURT.—CURTIS, Ch. J.—The defendant Dusenbury has acquired his rights, if any, to the fund in question, in one of two ways. He either derived his right to it, or to the custody of it, under the order of the court of common pleas, made January, 1874, which recites that he appears to be the person having the legal title and right to the possession of it, and which also directs the city chamberlain to pay it to him; or else he acquired it, under the assignment for the benefit of creditors made by Selah Hiler to the defendant Haight, November 7, 1872. Haight is claimed to have resigned this position as assignee in favor of the defendant Dusenbury.

Money paid into court, and held in its custody, and to be paid out upon its order, is a deposit of such a character, that it is a stringent duty not only of the court but of each and all of its officers, whether they are attorneys, clerks, or receivers, to protect it by all the lawful means in their power from improper or fraudulent diversion, or misapplication. When a wrongful payment of money in the keeping of the court is procured by collusion, and by fraudulent concealment, or false representations, the parties to such acts, or those profiting by them, acquire no legal title to the fund, and the person rightfully entitled to it has his remedy by action, and in some cases by proceeding summarily against the wrong-doer.

The recitals in an *ex parte* order, as to who appears to be the person entitled to the fund, and the direction to the custodian of it, to pay it to such person, when the order is procured by collusion and imposition upon the court making the order, do not protect the wrongful recipient of such fund from liability for it, to the person rightfully entitled to it. An order of this char-

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Opinion of the Court, by CURTIS, Ch. J.

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acter, made without notice, has none of the elements to constitute a bar, as *res adjudicata* against the lawful claimant.

On December 19, 1873, the plaintiff was appointed receiver of all the debts, property, equitable interests, and things in action of the defendant, Hiler, under proceedings supplementary to execution. This appointment was made upon the application of these judgment creditors, and he thereupon duly qualified as such receiver, and became vested with the right to the fund in question, subject to the rights, if any, of the defendant Dusenbury.

On January 7, 1874, the defendant Dusenbury, through his attorney, Mr. Randall, applied to the court of common pleas, for the order directing the fund in court to be paid to him. At the time of making this application, both he and his attorney had notice that the judgment creditors of Hiler claimed the whole or a part of this fund, and that the plaintiff was appointed receiver, with leave, among other things, to sue for, and recover this money. He also knew, at that time, of the existence of the orders of the court of common pleas of December 13, 1873, and of December 19, 1873, the first restraining the city chamberlain from paying it out, and the latter denying his own application that the fund be paid to himself. Yet, with a knowledge of the existence of these facts, both on his part and his attorney's, and by going before a different judge from the one who had made these existing orders, and by not disclosing their existence, this *ex parte* order for the payment to himself of the fund, with its recital of his rights to it, was obtained.

The steps taken by this defendant, and his concealment of these previous orders, were obviously acts in bad faith on his part, for the purpose of getting this money into his possession, in the face of the existing orders of the court to the contrary. It is impossible in

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such conduct to see anything but a gross abuse, accomplished by wrongful acts, and which cannot in any aspect protect this party to it and the recipient of the money thus obtained, from being made liable for it to the person lawfully entitled to it, as the receiver of the defendant Hiler, and the representative as such of these judgment creditors.

But a claim to this fund is made by the defendant Dusenbury, irrespective of such title as may have been acquired under the order that the city chamberlain pay it to him.

It is suggested that he succeeded to an interest in it as the successor of the defendant Haight to the trust created by the assignment for the benefit of creditors, made by Hiler to the defendant Haight, and which the latter resigned in favor of Dusenbury, and that the latter is thereby made to stand in the same position as the original assignee. If this assignment to Haight had any validity, it is difficult to perceive how the execution of the trusts under it can be transferred by a mere resignation of the trustee, in favor of some one else, unaccompanied with the consent of the *cestuis que trust*, or the order of court who is thereupon to stand in his place. If Haight, the assignee, wished to resign, there should have been a petition to the supreme court, for the acceptance of his resignation, and a discharge from the trust, and the appointment of the new trustee in his place should have been made by the court (1 *R. S.* 730, §§ 69, 70, 71; *Leggett v. Hunter*, 19 *N. Y.* 459; *Cruger v. Halliday*, 11 *Paige*, 819; *Thatcher v. Canda*, 3 *Keyes*, 157). The evidence in the case fails to show that the defendant Dusenbury succeeded to the *status* of Haight as assignee under the assignment, or became legally vested with any rights or interests thereunder to the fund in question.

There is also evidence justifying the finding of the court, that this assignment was made by Hiler to delay



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Opinion of the Court, by CURTIS, Ch. J.

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and defraud creditors, and was fraudulent and void as against the creditors of Hiler. Being an insolvent judgment debtor, he assigned his property, this fund, for the benefit of some of his creditors, leaving out these judgment creditors, whom the plaintiff, as receiver, represents, and directed the surplus to be held subject to his order. This is a trust for the use of the assignor, and renders the assignment void upon its face (*Goodrich v. Downs*, 6 *Hill*, 438).

However inconsiderate and uncalled for were the statements made, probably in ignorance of the facts, by the plaintiff in respect to this fund, after the making of the order for its payment by the chamberlain, he, as a receiver and as an officer of the court, was clothed with no powers to waive the equitable rights of these judgment creditors he was appointed to protect, and which was also known to Dusenbury.

The case shows that the defendants proceeded to the trial before the court without a jury, and without objection to so proceeding, and without demanding that the trial be had before a jury. Under such circumstances and not raising any objection until the case came on for argument before the appellate court, the defendants must be deemed to have waived such rights, if any they had (*Black v. White*, 37 *N. Y. Superior Ct. R.* 320).

It was strongly pressed at the argument, that Dusenbury even if the assignment was held void, should not be subjected to personal liability for the funds he had paid out. If Dusenbury was the assignee, and acted in good faith, it would be in accordance with well settled principles that he should be thus protected. But, as it is impossible to come to the conclusion that he either was assignee, or acted in good faith, he is not entitled to such protection. Nor does the disposition of such portions of the fund as he has parted with,



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appear to be of a character that calls for the equitable interposition of the court on his behalf.

The judgment appealed from should be affirmed, with costs.

SANFORD, J., concurred.

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CATHERINE E. KOHLER, EXECUTRIX, &C.,  
 PLAINTIFF AND RESPONDENT, v. AUGUST MATTLAGE AND ALBERT WEDEMEYER, IM-  
 PLEADED, &C., DEFENDANTS AND APPELLANTS.

BOND TO PAY CERTAIN DEBTS WHICH OBLIGEE WAS  
 LIABLE TO PAY, AND INDEMNITY AGAINST THE SAME.

In case of a simple indemnity bond there is no breach until actual damage is sustained by the obligee, who must prove the same against the obligor or his indemnitor to sustain his action. There is a distinction between such a bond and those like the bond in the present case, where the obligation is to perform a certain act, or to pay specific debts, and to hold harmless the obligee therefrom. In the latter case the breach is made and the contract broken, when the obligor fails to perform the act, or to pay the debts he covenanted to pay; and upon such failure and default, the obligee may recover the entire debt, although he had not been compelled to pay anything at the time the action was brought by him against the obligor (See cases cited in the opinion of the court).

Before CURTIS, Ch. J., and SANFORD, J.

*Decided May 8, 1877.*

This is an appeal by the defendants, Mattlage and Wedemeyer, from a judgment for \$3,602.49, rendered against the defendants at a trial before the court at special term.

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Statement of the Case.

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The action is upon a bond made by the defendant Chapman, in the penal sum of \$6,000, conditioned for the payment by Chapman, within nine months, of the debts of the firm, composed of the plaintiff's testator, John F. Kohler, and himself, and in which the defendants, Mattlage and Wedemeyer, the appellants, joined as sureties. Various defenses were interposed by the appellants.

The court found at the trial as matter of fact: *First.* That John F. Kohler departed this life at the city of New York, on September 25, 1873, leaving his last will and testament, bearing date May 15, 1867, which was duly admitted to probate on October 16, 1873, and letters testamentary thereon were duly issued to the plaintiff on the said October 16, 1873, and the said plaintiff duly qualified as executrix of said last will and testament.

*Second.* That at the time of his decease, the said John F. Kohler, and the defendant, William H. Chapman, were engaged in business in the city of New York, as copartners in the manufacture of a variety of bread known as "Kohler's Cream Bread."

*Third.* That on November 14, 1873, the said plaintiff, as executrix of said last will and testament of John F. Kohler, deceased, entered into an agreement in writing and under seal with the defendant, William H. Chapman, whereby he bought and said plaintiff granted and conveyed unto said defendant all the property and interest which said John F. Kohler, or his estate, had in said business of manufacturing "Kohler's Cream Bread." That in and by said agreement, and as consideration therefor, the said defendant Chapman covenanted and agreed to and with the plaintiff simultaneously with the execution and delivery of said agreement, to execute and deliver to the plaintiff, his three promissory notes for \$1,000 each, due in six, twelve and eighteen months respectively from the date

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of said agreement, and to assume and pay all the debts of said concern, existing at the date of said agreement, and to pay certain rents and taxes, and to execute and deliver to the plaintiff simultaneously with said agreement, notes and bond, a purchase money chattel mortgage containing the usual covenants and conditions of such mortgages, and covering all the personal property conveyed to him by said agreement, to secure the payment of the aforesaid three notes, and of the said debts, rents, and taxes, and as further security for the payment of the aforesaid debts, rents, and taxes, within nine months after the date of said agreement, said Chapman agreed to execute, acknowledge, and deliver to the plaintiff a bond in the penal sum of \$6,000, conditioned for the payment by the said Chapman of the aforesaid debts, rents, and taxes, within the aforesaid nine months, with two sureties to be approved by said plaintiff.

*Fourth.* That the defendant Chapman proposed the defendants Mattlage and Wedemeyer as his sureties on said bond, and they were accepted by the plaintiff, and without either fraud or false representation on plaintiff's part they thereupon duly executed and acknowledged the bond which is set forth in the complaint. That the said bond, agreement, notes and chattel mortgage were simultaneously executed and delivered, and were each and all parts of one and the same transaction; that said notes, bond and chattel mortgage were executed and delivered in conformity with the said agreement, and for the purpose of consummating the single bargain of selling and securing the consideration of the sale of the property mentioned in the third finding of fact. That there was no laches of the plaintiff or her agents in regard of her duties as to the collection of the amount due her under said agreement, or the enforcement of the liens acquired under said chattel mortgage.

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*Fifth.* That said defendant Chapman neglected and failed to pay certain of the debts secured by the said bond within the nine months provided for their payment, and immediately after the expiration of said nine months the plaintiff duly notified the said sureties of Chapman's default and of their liability to pay, and made due demand of payment of them. That said sureties thereupon granted, and reduced to writing and signed, an extension of the time for the payment by said Chapman of said unpaid debts for six months. That at the expiration of said extended time said Chapman has still neglected and failed to pay the said debts of said concern, amounting to the sum of three thousand two hundred and fifteen dollars and twenty cents, and said sureties were duly notified by plaintiff of said Chapman's default and of their liability to pay, and a second demand of payment was made of them and they refused to pay ; that the interest on said sum of three thousand two hundred and fifteen dollars and twenty cents, to the date of this decision, amounts to the sum of two hundred and thirty-one dollars and forty-one cents, making the total of three thousand four hundred and forty-six dollars and sixty-one cents.

The court further found as conclusions of law :

I. That the bond set forth in the complaint is an absolute undertaking on the part of the defendants, Mattlage and Wedemeyer, to pay the debts assumed by Chapman, in case of his default, and that the condition of said bond was broken immediately upon the default of said Chapman, and the said defendants, Mattlage and Wedemeyer, thereupon became liable to pay plaintiff the amount of said Chapman's legal liability to her.

II. That the said plaintiff is entitled to judgment against the defendants for the said sum of three thousand four hundred and forty-six dollars and sixty-one cents with costs.

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Opinion of the Court, by CURTIS, Ch. J.

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*Steele & Clark*, attorneys for appellants ; *Jefferson Clark*, of counsel.

*Strong & Spear*, attorneys for respondent ; *George H. Foster*, of counsel.

BY THE COURT.—CURTIS, Ch. J.—The appellants contend that the court erred in denying their preliminary motion at the trial, to dismiss the complaint. They urge that the complaint does not show that the plaintiff has been damnified or incurred any legal liability in consequence of any matter therein alleged, and that, to entitle the plaintiff to recover, it was necessary to show, either actual damages sustained, or a fixed legal liability incurred.

There is a difficulty with this claim of the appellants. Their bond is a departure from a simple contract to indemnify against damage. It is conditioned for the payment of the debts of the firm in a specified time, as well as to hold harmless the obligee from the payment of them. The condition was broken on the failure of Chapman to pay the debts of the firm within the specified time. The plaintiff, the obligee, had the right to recover the amount of the debts, when Chapman made default.

The complaint is upon this bond, executed by the defendants, which fixes and limits the measure of damages for this breach to the amount of the debts not paid by Chapman. The payment of these debts was a specific act, provided for by the terms of the instrument, to which the appellants were parties.

Where the obligation is that the party indemnified shall not sustain damage by reason of the acts or omissions of another, or by reason of any liability thereby incurred, there is no breach until actual damage is sustained, which the party indemnified must prove against the indemnitors to sustain his action.

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The distinction is recognized between this last described class of cases and those like the present, where the obligation is to perform a specific thing and to hold harmless the obligee from a liability, when the contract is broken upon a failure to do the act, or when liability is incurred (*Gilbert v. Winan*, 1 *Conn.* 550; *Sedgwick on Damages*, 2 Ed. 313; *Wright v. Whiting*, 40 *Barb.* 235; *Belloni v. Freeborn*, 63 *N. Y.* 390). In the latter case it was said by ALLEN, J., that when the bond was conditioned, as in this case, to pay the debt and save harmless the obligee against his liability to pay the same, the obligee might recover the entire debt upon default in its payment, without having paid anything.

The defendant Chapman failing to pay the debts at the expiration of the nine months, there was an extension of six months' further time granted him in which to do it, to which the other defendants, the appellants, became parties, by a consent indorsed upon the bond. At the expiration of this extension, Chapman still failing to pay the debts of the firm, and the appellants, upon whom demand was made refusing to pay, and the creditors having presented their debts as claims against the plaintiff's testator's estate, and eighteen months having elapsed, and they threatening suits, they were paid by the plaintiff out of the testator's estate. The legal remedies of the plaintiff against Chapman's estate were exhausted by judgments and executions returned unsatisfied, before this action was commenced.

Chapman failed to pay the notes in full, given to the plaintiff and secured by the chattel mortgage. This mortgage was foreclosed, and a judgment for a deficiency was recovered against Chapman for between \$1500 and \$1600, upon which an execution was also issued and returned unsatisfied. These judgments and unsatisfied executions show the insolvency of Chapman. There is no claim made of any collusion between the

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Opinion of the Court, by CURTIS, Ch. J.

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plaintiff and Chapman, and the recovery of the judgments against him by confessions, does not impair their legal effect. It was her duty as executrix to recover them in the mode that caused the least expense and delay (*Underhill v. Hunt*, 3 *Denio*, 321; *Bridgeport Ins. Co. v. Wilson*, 34 *N. Y.* 275).

The defendants introduced no evidence to show that the condition of their obligation for the payment of the firm debts, had been complied with. Their non-payment after the expiration of the time limited for their payment, and their amount sufficiently appears from the proofs in the case. The defendant Chapman testifies to the effect that their firm had the goods of these creditors, and that he examined the bills with the plaintiff's agent, Mr. Spear, and found they were all correct to the best of his knowledge.

The claim of the appellants that they were discharged from liability on the bond in suit, by a variation in the agreement between the executrix and Chapman is not sustained by the evidence. It is true, that Chapman testified that by an agreement between him and the plaintiff made subsequent to the written agreement, he had permission to sell other horses than those for which permission was given him in the written agreement. But on his cross-examination he gives a different version of it, and admits that he falsely stated to plaintiff's agent when the extension of the bond was made, that he had these three other mortgaged horses out at pasture, when in truth he had previously sold them, and that he only let it be known that he had done this when the plaintiff sought for them, to sell under the foreclosure of the mortgage. The testimony in the case justifies the refusal of the court to find that there was this permission given to the defendant Chapman to sell these three other mortgaged horses. The plaintiff made every reasonable effort to recover the mortgaged property, and the appellants cannot take

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Opinion of the Court, by CURTIS, Ch. J.

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advantage of the fraudulent acts of their principal, Chapman, in respect to the mortgaged property, to exonerate themselves from responsibility.

The sureties claim that they were discharged, by the neglect of the plaintiff to file a copy of the chattel mortgage within thirty days before November 14, 1875, to preserve the security. Copies had been filed for each of the preceding years, but it had been foreclosed July 24, 1875, and no copy was thereafter filed. The plaintiff had proceeded under the mortgage and duly foreclosed it, and if the principal for whom these appellants were sureties saw fit previously to secretly abstract, and convert some of the mortgaged chattels to his own use, which the plaintiff could not find to foreclose, it is not for them to take advantage of it and be benefited by his bad faith towards the plaintiff. There was no request on their part that a copy should be filed, or that any steps should be taken to enforce the mortgage, and no ground exists in such contingency to relieve the sureties (*Schroeppel v. Shaw*, 3 *N. Y.* 446).

The mortgage itself was a purchase money mortgage, and made to secure primarily the notes given for the purchase, and at no time was it as a security ample enough to provide for and secure the old partnership debts, or any portion of them. The omission to refile it, even if the plaintiff had been under any obligation towards the sureties to do so, and they had requested it and it had been unforeclosed, would not have damaged the appellants (*Black River Bank v. Preston*, 41 *N. Y.* 453). The evidence fails to establish the neglect of any obligation on the part of the plaintiff, towards the sureties in reference to filing a copy of the chattel mortgage.

The sureties insist that they were discharged from any liability over \$2000 on the bond, in consequence of the plaintiff's filing in the register's office on November



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10, 1874, a certificate that her interest in the mortgaged premises was then only \$2,000, being the amount of the unpaid notes given for the purchase.

The omission to refile a copy of a chattel mortgage and a statement of the interest of the mortgage by virtue thereof in the property, under chapter 501, *Laws of 1873*, only invalidates it against the creditors of the mortgagor and subsequent purchasers or mortgagees in good faith. The position of Chapman and these sureties was unaffected by the amount named in the statement. The mortgaged property was not worth more than enough to pay the two notes. There was no bad faith about it on the plaintiff's part. It is shown to have been an error of her agent committed inadvertently, by which reference to these partnership debts was omitted in the statement.

If the appellants are to be put in the attitude of sureties who have paid the debt, and are thereby entitled to be substituted in the place of the creditor as to all the security held by the creditor to enforce payment of the principal debtor, then, in the language of Chancellor KENT (*Hayes v. Ward*, 4 *Johns.* 130), the creditor "must do no willful act, either to poison it in the first instance, or to destroy or cancel it, afterwards."

There is no evidence that the sureties are thus prejudiced. There is no obligation resting on the holder of a chattel mortgage, under such circumstances, at his own expense and trouble, to file copies of the mortgage and also statements, when the sureties make no request to him to do so, and make no offer to pay the expenses of it, and especially when their principal is, without the knowledge of their creditor, appropriating and selling the mortgaged chattels. It was their business, to see that their principal committed no torts of this character, and if they wished protection from his bad faith or from his other creditors, if he had any, to notify the mortgagee and to request the refileing of the mortgage

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and statement, and to offer to pay for the expense of it (*Schroeppel v. Shaw*, 3 *Com.* 446 ; *Hoffman v. Hurlburt*, 13 *Wend.* 377 ; *Herrick v. Borst*, 4 *Hill*, 650 ; *Supervisors Monroe Co. v. Otis*, 62 *N. Y.* 88).

The appellant's exceptions do not call for a reversal of the judgment and a new trial.

The judgment appealed from, should be affirmed with costs.

SANFORD, J., concurred.

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JOHN HADEN, *et al.*, PLAINTIFFS AND APPELLANTS, v. MICHAEL COLEMAN, DEFENDANT AND RESPONDENT.

CONTRACT FOR THE ERECTION OF BUILDINGS.

ARCHITECT'S CERTIFICATE OF THE PROGRESS AND COMPLETION OF THE WORK.

A party who enters into a contract to perform certain work, payment for which is to be made according to the provisions of the contract, one of which is the production by him of the architect's certificate of the completion of the work, must produce that certificate as a condition precedent to payment, and is as much bound by that provision and condition in the contract as by any other (*Smith v. Brady*, 17 *N. Y.* 176 ; *Glattons v. Black*, 50 *Id.* 148).

Payments made by the defendant on the contract without any demand or requirement of the production of such a certificate, does not operate as a waiver of the certificate as to the other payments, or of the final certificate upon the completion of the work (*Barton v. Hermann*, 11 *Abb. Pr. N. S.* 378).

The statements of the defendant, that he was pleased with the work, or that he was dissatisfied with the architect, or a negotiation for the release of the payment of a loan to the defendant by the builder, as a condition for the payment of the balance claimed by the builder, on the contract

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Opinion of the Court, by CURTIS, Ch. J.

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in question, do not create a waiver of this condition precedent on the part of the builder.

Before CURTIS, Ch. J., and SPEIR, J.

*Decided May 8, 1877.*

Appeal from a judgment entered upon an order dismissing the plaintiff's complaint at the trial.

The action is brought to recover a balance of \$2,000, for building three five-story houses for the sum of \$16,500 on defendant's land, under a contract made by the defendant with the plaintiffs. After the action was commenced the defendant paid on account of the buildings and for the plaintiff's use in a proceeding for the enforcement of a mechanic's lien, \$1,000.

The defendant answered, that the payment for the work was, by the terms of the contract, to be made when the architect's certificate of completion was signed and obtained, and that no such certificate had been signed or obtained. The court dismissed the complaint, on the ground that the plaintiffs had not shown sufficient to release him from the obligation to furnish the certificate, to which ruling the plaintiff excepted. Plaintiffs claimed that such certificate had been waived by the defendant.

*Geo. W. Van Siclen*, for appellant.

*Joseph H. Choate*, for respondent.

BY THE COURT.—CURTIS, Ch. J.—The agreement and specifications between plaintiffs and defendant, for building the houses, called for the architect's certificate. The agreement provides that the plaintiffs will “well and sufficiently erect and finish the new buildings . . . agreeably to the drawings and specifications . . . in a good workmanlike and substantial manner,

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to the satisfaction and under the direction of the architect, to be testified by a writing or certificate under the hand of the architect." And again, it requires that the payments for said buildings should be made in certain instalments, each to be paid when certain parts of the work was finished, provided, that in each of the said cases a certificate shall be obtained and signed by the architect, certified by him to that effect.

The *specifications* provide that all the work is to be done in the neatest and best workmanlike manner, subject to the approval and superintendence of the architect, whom the owner appoints for that purpose.

No certificate from Mr. Waring, the architect, was obtained by plaintiffs, who claimed that such certificates were waived by defendant.

The plaintiffs having thought proper to enter into a contract with the defendant, making the production of the architect's certificate a condition precedent to the payment, are as much bound by that obligation as by any other (*Smith v. Brady*, 17 N. Y. 176; *Glamais v. Black*, 50 *Id.* 148). No such certificate was ever obtained, nor does it appear that any application was ever made to the architect for it.

The plaintiff relies upon a waiver by the defendant of the certificate. Certain conversations with the defendant are testified to by the plaintiff, Haden. But nothing was said by the defendant in these conversations, directly or indirectly, tending to show that he waived his right to the production of the architect's certificate, if he chose to insist upon it. His expressions that he was pleased with the work, or dissatisfied with the architect, or that he wanted to have plaintiff release him from the payment of a loan the plaintiff had at a previous time made him of \$1,000, as a condition of paying the balance on the contract in question, fail to create a waiver of this condition precedent, contained in the contract.

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Statement of the Case.

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It was justly considered by the court at the trial, that the payments made by the defendant without demanding the architect's certificate established no more than that, as respects these payments, the defendant did not choose to rely upon any legal defense he might have to the contract. Such payments of some of the installments without the production of the certificate, cannot operate as a waiver of the final certificate upon the completion of the work (*Barton v. Hermann*, 11 *Abb. Pr. N. S.* 378).

The judgment appealed from should be affirmed, with costs.

SPEIR, J., concurred.

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ANN L. NEILL, PLAINTIFF AND RESPONDENT, v.  
THE AMERICAN POPULAR LIFE INSUR-  
ANCE COMPANY, DEFENDANT AND APPELLANT.

LIFE INSURANCE.

RELATION OF POLICY TO APPLICATION.—AGE OF APPLICANT MUST BE CORRECTLY STATED.—PROOFS OF DEATH.—EFFECT OF STATEMENT THEREIN IN REGARD TO AGE OF APPLICANT THAT DIFFER FROM THE APPLICATION.—ERRORS IN SAME MAY BE CORRECTED BY PAROL PROOF ON THE TRIAL.

In an application for life insurance the company have a right to insist and to stipulate that true answers be given to its inquiries in regard to the age of the applicant, and false answers in that respect will relieve the company from the conditions of the policy.

If, by the proofs of death, it appears that the applicant was a year older than appeared from his original application, parol proof may be given to show that the statement in such proofs was made by mistake. The insured is not estopped from showing the mistake.

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Opinion of the Court, by CURTIS, Ch. J.

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As the proofs of death in the case did not mislead or injure the company, nor cause it to do or to omit to do anything to its prejudice, *estoppel in pais* does not exist.

The case of *Irving v. Excelsior Fire Insurance Co.*, 1 Bos. 507, considered as overruled to some extent by *McMaster v. Insurance Co. of N. America*, 55 N. Y. 222, and *Parmlee v. Hoffman Insurance Co.*, 54 N. Y. 193.

Before CURTIS, Ch. J., and SEDGWICK and SPEIR, JJ.

*Decided May 8, 1877.*

Appeal from a judgment entered upon a verdict in favor of the plaintiff for \$5,195.

The action is brought upon a policy of insurance, made by the defendant on the life of James Neill, the husband of the plaintiff. The policy was for \$5,000, and was issued in 1868. The premiums were all duly paid.

The answer of the defendant sets up that it was stated in the application for insurance, that the age of the insured was fifty years, whereas the defendant avers upon information and belief, that his age was fifty-five years.

*George Bliss*, for appellant.

*John H. Parsons*, for respondent.

BY THE COURT.—CURTIS, Ch. J.—The proofs of death showed a discrepancy of one year, making the insured one year older than he was stated to be in the original application. This discrepancy was proved at the trial to have been caused by an error of one year in the computation by the person who prepared the proofs of loss, and not to have resulted from any error in the original application. There was no conflicting evidence on this point.

The court charged that the company had a right to

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Opinion of the Court, by CURTIS, Ch. J.

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insist and stipulate, that true answers should be made in the original application, and that if the answer in respect to the age of the applicant is untrue, the plaintiff was not entitled to recover anything. That they were to determine if there was this error in the original application, and if so, to find for the defendants; but if they found that it occurred in making up the proofs of death, and believed the testimony and explanation testified to by the person making up such proofs, they should find for the plaintiff. There were no exceptions to the charge.

The only point submitted by the defendants on the appeal is, that the court erred in admitting evidence, that the statement of age in the proofs of death was an error. The case of *Irving v. Excelsior Fire Ins. Co.*, 1 *Bosw.* 507, is cited to show that an *estoppel in pais* is applicable to the facts of this case; but it is conceded that this decision is perhaps to some extent overruled in *McMaster v. Prest., &c. of Ins. Co. of N. America*, 55 *N. Y.* 222. In the latter case it was held, that the proofs of loss did not create the liability to pay the loss, and that the insured was not estopped from showing that a statement in the proofs of loss was made by mistake. This view was sustained in *Parmlee v. Hoffman Ins. Co.*, 54 *N. Y.* 193. It is apparent that as the declaration of age in the proofs of death in the case in question, did not mislead or injure the defendant, or was calculated so to do, or to lead the defendant to do or omit to do anything by which it would be prejudiced by a denial of the declaration, that the basis for an *estoppel in pais* does not exist.

Judgment appealed from should be affirmed with costs.

SEDGWICK and SPEIR, JJ., concurred.

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Statement of the Case.

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HORACE B. CLAFLIN, *et al.*, PLAINTIFFS AND APPELLANTS v. S. B. MOORE, *et al.*, DEFENDANTS AND RESPONDENTS.

FRAUD.

False representations and a suppression or omission to state all the liabilities of a firm, when professing to so do, for the purpose of obtaining credit, are equally inconsistent with honesty and good faith.

A party is not obliged to answer questions nor to volunteer statements in regard to his capital and business affairs, when seeking credit; but when he undertakes to give a statement of his affairs in order to obtain such credit, common honesty requires him to give a truthful and full statement, and under such circumstances, there is as much fraud in a suppression or omission to disclose an integral part of his liabilities in order to deceive the party from whom he seeks credit, as there would have been in making a false representation as to the amount of his assets.

It is impossible to reconcile alleged failures of memory in regard to large liabilities (which in this case exceeded the capital claimed in the statements and representations) with what is commonly known and recognized as honesty and fair dealing among business men. Such allegations cannot be received in justification of such suppressions and omissions. The approval of the acts of a party under such circumstances would be at variance with the settled principles on which mercantile transactions and commercial credit rest and are governed.

Before CURTIS, Ch. J., and SEDGWICK and SPEIR, JJ.

*Decided May 8, 1877.*

Appeal from an order of the special term, vacating an order of arrest.

*Almon Goodwin*, for appellants.

*Charles Matthews*, for respondents.



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Opinion of the Court, by CURTIS, Ch. J.

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BY THE COURT.—CURTIS, Ch., J.—The defendant, S. B. Moore, a country merchant at Wilkesbarre, Penn., when applied to by the plaintiffs in January, 1874, for a statement of the pecuniary condition of his firm, which consisted of his brother Oscar C. Moore and himself, and who bought goods on credit of the plaintiffs, stated in substance that their assets were \$36,028.73, and that they owed \$20,066.78. This showed a capital of \$15,961.95.

The plaintiffs continued to sell on credit to the defendants until the latter owed them, in September, 1876, \$4,069.70, part of which was for goods sold the defendants that month. In the course of that month the defendants made an insolvent assignment and claimed to be unable to pay anything.

It appears that when the defendant S. B. Moore made the statement of the financial condition of his firm to the plaintiffs, he omitted to mention that they owed their father \$5,500 for capital to commence business with, for which then or subsequently a judgment note was given, and also that he omitted to mention that their firm were then indorsers of the notes of the defendant Oscar C. Moore for about \$19,000.

As these omitted liabilities exceeded their capital, and would, if mentioned to the plaintiffs, probably have terminated the defendants' credit with them, it is desirable to consider if these omissions can be reconciled with honesty and fair dealing on the part of the defendant, S. B. Moore.

It is but just to him, to say that he does not deny the fact of making the omissions, but it is difficult to be satisfied with his reasons for doing so. He states that not being asked about the indebtedness to his father, and not thinking about it, he did not speak of it, and the same reason is in substance assigned for not speaking of the firm's indorsements for Oscar C. Moore.

It is the most natural thing in the world, when a

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Opinion of the Court, by CURTIS, Ch. J.

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man is seeking credit, and is asked by the person from whom he seeks it, about his pecuniary condition, that he should remember such liabilities as the defendant refers to. It is difficult to suppose that this defendant would forget at such a time about the note the defendants gave their father for capital in their business, especially as they remembered to have it put in the form of a judgment note, not certainly with a view of prejudicing him in securing himself in a race with their other creditors then or at some future day. Even conceding that the failure to embrace this debt in their statement of liabilities to plaintiffs was a mental inadvertence consequent upon the plaintiffs not asking the defendant about it, which, in view of their having no notice of it, it was not easy for them to do, still it is asking too much to require the court to believe that for these same reasons the defendant did not disclose that they were liable as indorsers for one of their firm, in a sum far exceeding the amount of the capital they claimed in their statement to plaintiffs to have, unless there is stronger evidence to support such a theory than the papers on this appeal disclose.

The defendant was not obliged to answer a question, or to volunteer any statement, but having undertaken to give a statement of the affairs of his firm, in order to get a credit from the plaintiffs, common honesty required him to give a truthful statement, and under such circumstances, there is as much fraud in a suppression to disclose a part of their liabilities in order to deceive the plaintiffs, as there would have been in a false representation of the amount of their assets.

It is impossible to reconcile these coincidences of alleged failures of memory on the defendant's part in respect to the liabilities of his firm, and the other circumstances appearing in the case, with what is commonly known as honesty and fair dealing among business men.

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Statement of the Case.

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The defendant must have known all along that the plaintiffs were relying upon his untrue statement, and if that untruthfulness arose from a temporary failure of memory at the time he made the statement, it was his duty to have corrected it, and not to have gone on for several months, until the purchases from plaintiffs were largely increased. It is absurd to suppose he did not think of these liabilities until the firm was forced to make an assignment. At that time, the note to their father, with interest, was \$7,672.50, and the indebtedness for Oscar C. Moore was \$19,943.51, and their remaining debts about as much more, while their stock, their chief assets, was sold by the assignee for \$8,000.

The acts of the defendant are not consistent with good faith, and to sustain them as such, would be at variance with the settled principles on which mercantile transactions and commercial credit rest, and must in the nature of things be governed.

The order of the special term vacating the order of arrest, should be reversed, and the order of arrest re-instated.

SPEIR, J., concurred, SEDGWICK, J. not voting.

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BENJAMIN P. FAIRCHILD, PLAINTIFF AND APPELLANT, v. THERESA LYNCH, DEFENDANT AND RESPONDENT.

I. AGENCY FOR THE RECEPTION OF A DEED.

1. PRIMA FACIE EVIDENCE OF.

(a.) *Conveyance of the property by the alleged principal and admissions by him in an answer in another action, is.*

1. F and C entered into a contract whereby F agreed to convey to C certain premises. C directed F to make the deed to L. In pursuance of such direction F executed a deed conveying the premises to L and delivered it to C

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Statement of the Case.

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for L. This deed conveyed the premises "subject to a certain mortgage made by F . . . . . which said mortgage the party hereto of the *first* part assumes and agrees to pay as part of the consideration hereinbefore expressed." L subsequently conveyed the premises to B by a deed in which her grantee agreed to pay said mortgage as part of the purchase money. In an action subsequently brought against F, L, B, and others, to foreclose this mortgage, the complaint alleged that F sold and conveyed the premises to L by a deed in which "the said L assumed said mortgage as part of the consideration on such purchase and agreed to pay the same." L, by her verified answer to this complaint, admitted that F sold and conveyed to her, and further alleged "and this defendant received the said deed and this defendant admits that this defendant received said land subject to said mortgage," *but she therein denied that she had ever agreed to pay the mortgage, and denied that under the deed to her she was bound to pay it.* In that action judgment of foreclosure and sale was rendered on consent of her attorney which did not charge her with personal liability for any deficiency.

## HELD,

*prima facie* evidence that C was L's agent for the purpose of accepting the deed from F to her, and that by his acceptance L became bound to perform any agreement on her part contained in it.

1. ASSUMPTION OF MORTGAGE.—Also held that if, on a proper construction of the deed it contained a clause whereby the property was conveyed "subject to a mortgage which the party of the second part assumed and agreed to pay," *L was bound to perform such agreement, and to save F harmless from any liability on the mortgage.*

## II. DEED—CONSTRUCTION OF.—CHANGE OF WORDS.

## 1. MORTGAGE ASSUMPTION CLAUSE.

(a.) *The word "first" turned in "second."*

1. A deed contained the following clause "subject nevertheless to a certain mortgage . . . . . which the party hereto of the *first* part assumes and agrees to pay as part of the consideration hereinbefore expressed." The word "*first*" was construed to read and mean "*second*," and as thus construed constituted an agreement by the grantee to pay the mortgage.

## III. MAXIM.

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*Verba intentioni et non e contra debent inservire, ut res magis valeat quam pereat*—applied.

IV. *EQUITY ACTION.*

1. CAUSE OF ACTION AT LAW MAY BE RECOVERED IN IT.

(a.) If a plaintiff brings an action for equitable relief, and on the trial establishes a cause of action at law, he may, although he fails to establish any right to equitable relief, recover judgment on such cause of action at law, the defendant not having demanded a trial by jury or raised any objection.\*

Before SEDGWICK and SANDFORD, JJ.

*Decided May 8, 1877.*

Appeal from a judgment in favor of defendants, for costs, entered on dismissal of complaint after a trial at special term by the court without a jury.

The complaint averred the making of a contract between the plaintiff and one Leonard, for the sale and conveyance to the latter of a house and lot of land on the northerly side of Twenty-seventh street, in the city of New York, for the price or sum of \$21,500, to be paid partly in cash, partly by a conveyance of other premises to the plaintiff, and partly by the purchaser's assuming the payment of a mortgage for \$15,000, then on the premises, and subject to which the plaintiff's conveyance thereof was to be made; that Leonard assigned the said agreement to the defendant who afterward completed the purchase, accepting from the plaintiff a warranty deed of said premises, in which it was stated that said premises were conveyed subject to the mortgage, the same forming part of the consideration money of such conveyance; that it was thereupon intended, both by the said plaintiff and said defendant, that the said deed should further state that the defend-

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\* NOTE.—Of course, if the facts constituting the legal cause of action are not averred in the complaint and the defendant raises the point that although the facts proven constitute a legal cause of action, yet such cause of action is not complained upon, no recovery can be had thereon.

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Statement of the Case.

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ant thereby assumed and agreed to pay said mortgage as part of such consideration money, but by a mere clerical error and mistake, unknown to and unobserved by both plaintiff and defendant, it was stated in said deed that "the party of the *first* part thereto, that is to say, *the plaintiff herein*, thereby assumed and agreed to pay the said mortgage, as part of the consideration money thereinbefore expressed. The complaint further averred that the defendant accepted said deed, intending thereby to assume and in equity and good conscience did assume and agree to pay said mortgage, as part of the consideration of her purchase; that by virtue of such conveyance defendant became seized in fee of said premises subject to said mortgage, and became thereby bound to indemnify and save harmless the said plaintiff from the said mortgage and all the conditions therein. The foreclosure of the said mortgage by the assignees thereof was also averred, the result of such foreclosure being a judgment against the plaintiff for a deficiency of \$5,585.71. Then followed an averment of the payment of said sum by the plaintiff to the assignees of the mortgage, as required by such judgment, whereby "an action has accrued to the said plaintiff to demand and have of and from the defendant herein the sum of \$5,585.71, with interest from March 3, 1875," and a demand of judgment against the said defendant, (1), for a reformation of the deed, by correcting the mistake above mentioned, and (2), for the recovery from the defendant of the said sum of \$5,585.71, with interest.

The defendant answered denying any knowledge or information as to the alleged agreement between the plaintiff and Leonard, and any intent on her part to assume or pay the said mortgage. She averred that she paid Leonard, who, as she was informed and believed, owned the premises, the sum of \$11,000, as the full purchase price thereof, and was to take the same subject to a mortgage of \$15,000, represented to her as

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Statement of the Case.

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being upon the said premises ; but, that she did not, in any way, manner or form, agree to assume or become liable personally for the payment of said mortgage. She further denied that by reason of anything in said deed contained she became or ever was or is now bound to indemnify the said plaintiff or to save him harmless from the said mortgagee.

The answer put in issue all the allegations of the complaint not specifically admitted, and set up affirmative defenses, which it is unnecessary to state.

Upon the trial the plaintiff proved, among other things, that on February 14, 1873, he was seized in fee and possessed of the house and lot described in the complaint ; that on February 15, 1873, he mortgaged the same to one Luyster, to secure the payment of \$15,000, with interest thereon ; that on February 5, 1873, he made an agreement with William Leonard to sell and convey to him the said premises for the price of \$21,500, subject to the said mortgage, and to the payment thereof by Leonard as part of such contract price ; that in and by said agreement Leonard agreed to purchase said premises on the terms and conditions therein mentioned, and to pay said purchase money by assuming the payment of said mortgage as part thereof, and to pay the residue partly in cash and partly by a conveyance of other property to the plaintiff ; that subsequently to said February 5, 1873, Leonard directed the plaintiff to execute a deed to the defendant herein, instead of executing the same to the said Leonard, and that on or about February 18, 1873, the plaintiff, for value received, and by direction of Leonard, executed and delivered to the defendant a deed of said premises, bearing date February 18, 1873, whereby the said plaintiff, therein described as the party of the first part thereto, for an expressed consideration of \$26,000,—recited to have been paid to him by the defendant, who was therein described as the party of the second part,



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Statement of the Case.

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conveyed to said defendant the said premises, "subject, nevertheless, to a certain indenture of mortgage given by the party hereto of the first part to secure the principal sum of \$15,000, and interest, . . . which said mortgage the party hereto of the *first* part hereby assumes and agrees to pay as part of the consideration hereinbefore expressed."

The plaintiff further proved that on April 1, 1873, by deed bearing date on that day and duly executed under her hand and seal, the defendant for the consideration therein expressed of \$26,000, conveyed the said premises to one Edward D. Bell, describing them in and by said deed as "the same premises conveyed to the said party of the first part, (the defendant) by Benjamin P. Fairchild, (the plaintiff) by deed, dated February 18, 1873, and recorded, February 20, 1873;" such conveyance was made, subject to the mortgage mentioned and referred to in the deed from plaintiff to defendant, and Bell, the defendant's grantee, therein and thereby assumed and agreed to pay the said mortgage as part of the consideration of the said conveyance from defendant to him.

The plaintiff further proved that the deed executed by him to defendant was drawn by an attorney, one George F. Demarest, at his request; that he handed to Demarest his contract with Leonard and instructed him to prepare a deed in accordance therewith, substituting the name of the defendant for that of Leonard, as grantee; and that he intended to execute a deed subject to the mortgage, the grantee assuming and agreeing to pay it. He testified that he never knew of the phraseology of the deed whereby it was stated that the party of the "*first*" part assumed payment of the mortgage, until the answer of the defendant was served in the present suit. Demarest testified that he received instructions from the plaintiff to prepare the deed in accordance with the contract between the plaintiff and



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Statement of the Case.

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Leonard, and delivered the deed to Leonard for the defendant. It was not delivered to the defendant personally. He supposed the deed conformed to the contract, until after the commencement of this suit; and he testified, without objection, that the clause of the deed, whereby the party of the *first* part thereto assumed and agreed to pay the mortgage as part of the consideration therein expressed, was strictly and clearly a clerical error, as the intention was that the grantee should assume the mortgage.

The plaintiff further proved that by sundry mesne assignments thereof the said mortgage with the bond therein mentioned was transferred to the trustees of Elizabeth C. Chauncy, deceased, and that, the same having become due, by reason of default in the payment of interest, agreeably to certain conditions therein contained, an action was commenced by the said trustees in the supreme court, on September 23, 1874, for the foreclosure of said mortgage. Plaintiff, defendant and said Bell were, with others, made parties defendant, and such proceedings were thereupon had, that a judgment was finally rendered in said suit, for the recovery by said trustees of the said sum of \$5,585.71, against the said plaintiff, the said sum being a deficiency of the proceeds of the sale of said mortgaged premises, to satisfy the amount adjudged to be due to said trustees upon the said mortgage.

The plaintiff also proved that he had paid the said sum with interest to said trustees as required by said judgment.

By the record of the said judgment which was put in evidence on the part of the plaintiff, it appeared that the defendant answered the complaint in foreclosure, and, by her answer thereto, expressly admitted that the plaintiff herein sold and conveyed to her the mortgaged premises, and that she received the deed therefor. She also admitted that she received the said

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Appellant's points.

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land, subject to the said mortgage, and afterward sold and conveyed said land to said Bell subject thereto; but she therein denied that she had ever agreed to pay the mortgage, and denied that under the deed to her she was bound to pay it. The judgment of foreclosure and sale was rendered upon the consent of her attorney, and did not charge her with personal liability for any deficiency.

At the close of the evidence on the part of the plaintiff, counsel for defendant moved to dismiss the complaint on the ground that there had been no proof that the defendant adopted or agreed to the contract between plaintiff and Leonard, or in any way agreed to assume the mortgage.

The court dismissed the complaint, counsel for plaintiff duly excepting, and judgment was thereupon entered in favor of the defendant.

*S. F. Cowdrey*, attorney, and of counsel for appellant, urged:—I. The cause of action, stated in the complaint, entitles plaintiff to both the equitable and legal relief prayed for, and those causes of action were properly joined (*Code*, § 167; *Haire v. Baker*, 5 *N. Y.* 362; *Bradley v. Aldrich*, 40 *Id.* 509, 511, 512; *Sternberger v. McGovern*, 56 *Id.* 20; *Bruce v. Kelly*, 5 *Hun*, 229; *Anderson v. Hunn*, 12 *Sup. Ct.* 79; *Mann v. Fairchild*, 2 *Keyes*, 112; *Heywood v. City of Buffalo*, 14 *N. Y.* 540; *McKeon v. See*, 4 *Robt.* 464; *Margraf v. Muir*, 57 *N. Y.* 159; *Van Santvoord Eq.* 15, 19, 23).

II. The right to legal relief being shown by the complaint, the court does not lose its right to grant such legal relief, even if the plaintiff fails to obtain the equitable relief prayed for (*Barlow v. Scott*, 24 *N. Y.* 45; *Sternberger v. McGovern*, *supra*; *Bradley v. Aldrich*, *supra*; *N. Y. Ice Co. v. N. W. Ins. Co. of Oswego*, 23 *N. Y.* 357; *Wells v. Yates*, 44 *Id.* 525, and cases cited at p. 531).

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Appellant's points.

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III. The circumstances of the case show that the words used in the *habendum* clause of the deed, by which "the party of the *first* part" assumes payment of the mortgage, were inserted by mistake, that they do not declare the intention of the parties, and that the intention of the parties was that "the party of the *second* part" should assume such payment.

IV. But the defendant did receive the deed, and she fully consummated the contract of sale, in precisely the same manner as Leonard would have done. She conveyed, or caused to be conveyed (it matters not which), to the plaintiff, the lots described in the contract; and she paid, or caused to be paid in cash, the balance of the purchase-money according to the contract; and, she sold the property to Bell in 1873, requiring Bell to assume payment of the mortgage (*Vide* Campbell v. Smith, 8 Hun, 6).

V. If the defendant did not know when the deed was delivered what its contents were, she must have believed that the deed conformed to the contract. If she did know the contents of the deed as delivered to her, she was guilty of a fraud on the plaintiff, and this alone is sufficient to authorize reformation of the deed (Wells v. Yates, 44 N. Y. 525; Cited and approved, Bryce v. Lorillard Fire Ins. Co., 55 Id. 243. The fraud need not be set forth in complaint, *Ib.*).

VI. There is no principle of equity more fully established than that courts of equity will reform and correct written instruments where, from accident or mistake, they fail to express the intention of the parties thereto. As to accident: *Willard's Eq. Jur.* 51, 52, 54, 55, 57; *Story's Eq. Jur.* § 78. As to mistake: *Willard's Eq. Jur.* 54, 59, 69, 72, 73, 74, 75, 78, 79; *Fonblanque's Eq.*, book 1, ch. 3, § 1, and notes. (Gillespie v. Moon, 2 Johns. 585; Lyman v. United Ins. Co., 17 Id. 375; Wood v. Hubbard, 10 N. Y. 484; Rider v. Powell, 28 Id. 312). Citing and ap.

## Appellant's points.

proving: *Keisselbrack v. Livingston*, 4 *Johns.* 144; *Moale v. Buchanan*, 11 *Gill & Johnson*, 325; *De Peyster v. Hasbrouck*, 11 *N. Y.* 582; *Lyman v. United Ins. Co.*, 17 *Johns.* 375; *Matthews v. Terwilliger*, 3 *Barb.* 50; *Quick v. Stuyvesant*, 2 *Paige*, 84; *Haire v. Baker*, 5 *N. Y.* 357; *Kerr on Frauds*, 338, 345, 349, 354, 341; *Gates v. Green*, 4 *Paige*, 355; *Wells v. Yates*, 44 *N. Y.* 525; *Kent v. Manchester*, 29 *Barb.* 595; *Mills v. Lewis*, 55 *Id.* 179; *Smith v. Mackin*, 4 *Lans.* 41; *Story's Eq. Jur.* §§ 110, 153, 157, 159, 160, 162, 164 f, 168). Even although it be the mistake of one party only (*Andrews v. Gillespie*, 47 *N. Y.* 490; *Nevins v. Dunlap*, 33 *Id.* 680). A mistake of the scrivener who prepared the instrument, is sufficient ground for reforming the instrument (*Nevins v. Dunlap*, *supra*; *Wood v. Hubbell*, 10 *N. Y.* 484; *Willard's Eq.* 73; *Story's Eq.* § 164, f; *Huss v. Morris*, 63 *Pa.* 367, note A; *Van Darge v. Van Darge*, 23 *Mich.* 321; *Hunt v. Rousmaniere's Admrs.*, 1 *Peters*, 13; cited and approved in *Pitcher v. Hennessy*, 48 *N. Y.* 424; *Kerr on Frauds*, 349). Relief will be granted where the mistake is fairly implied from the nature of the transaction (*Story's Eq.* § 162; *Kerr on Frauds*, 354).

VII. But aside from the question of the plaintiff's right to equitable relief, the plaintiff is entitled to judgment on the covenant in the deed, as it stands, without any reformation. His remedy is completely established on legal grounds alone.

*Rules of Construction.*—The construction shall be favorable to apparent intent of parties (*Touchstone*, 86, 87; *Sanders v. Betts*, 7 *Wend.* 287). *Held*, in this case, that the words "party of the second part," in a covenant in a deed, mean "party of the first part." The construction must be upon the entire deed, one part to help to expound another (2 *Parsons on Con.* 501; *Ludlow v. McCrea*, 1 *Wend.* 231; *Tabb v. Archer*, 3 *Henn. & Mun.* 435; *Horry v. Horry*, 2 *Dessauss.*

## Respondent's points.

115; *Rawle on Cov.* 697; 2 *Kent's Com.* 556; *Sumner v. Williams*, 8 *Mass.* 214; *Fowle v. Bigelow*, 10 *Id.* 379; *Hopkins v. Young*, 11 *Id.* 302; *Van Hagin v. Van Rennselaer*, 18 *Johns.* 420).

VIII. The defendant, the grantee named in the deed, is bound by the covenants therein contained, although not signed by her (*Atlantic Dock Co. v. Leavitt*, 54 *N. Y.* 35, and cases cited; *Trotter v. Hughes*, 2 *Kern.* 74; *Belmont v. Coman*, 22 *N. Y.* 438; *Spaulding v. Hallenbeck*, 35 *Id.* 206; *Ricard v. Sanderson*, 41 *Id.* 179).

IX. The defendant, although a married woman, having power to purchase the land, and having purchased it for herself—having, also, subsequently conveyed it as her separate estate, had power to make contracts relative thereto (*Laws of 1860*, 157, § 3, [amended] *Laws of 1862*, 343, § 1; *Frecking v. Rolland*, 53 *N. Y.* 422; *Corn Ex. Fire Ins. Co. v. Babcock*, 42 *Id.* 613; *Sigel v. Johns*, 58 *Barb.* 620; *Ainslie v. Mead*, 3 *Lans.* 116; *Yale v. Dederer*, 22 *N. Y.* 450; *Rowe v. Smith*, 55 *Barb.* 417; *Rowe v. Smith*, 45 *N. Y.* 230; *Ballin v. Dillaye*, 37 *Id.* 35; *Vrooman v. Turner*, 8 *Hun*, 82).

*William G. Bussy*, attorney, and of counsel for respondent, urged:—I. The action is brought in equity, to reform a deed (see complaint). To entitle a party to a decree reforming a written instrument, the plaintiff must bring himself within the following rules: (1.) The mistake must have been a mutual mistake, and must be plain, and clearly proved. (2.) The mistake must be of fact, not of law; and a mistake as to the meaning of language is a mistake of law. (3.) It must be clearly shown to the court what the real contract was. If any doubt be left on this point, the written contract cannot be disturbed (*Kent v. Manchester*, 29 *Barb.* 595; *Mills v. Lewis*, 37 *How. Pr.* 418; 55 *Barb.* 179; *Pennel v. Wilson*, 2 *Abb. Pr. N. S.* 466; *Lyman v. United Ins.*

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Respondent's points.

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Co., 17 *Johns.* 372 ; Marvin v. Bennett, 26 *Wend.* 168 ; O'Donnell v. Harmon, 3 *Daly*, 424 ; Getman v. Beardsley, 2 *Johns. Ch.* 585 ; Phoenix Fire Ins. Co. v. Gurney, 1 *Paige*, 278 ; Boardman v. Davidson, 7 *Abb. Pr. N. S.* 939 ; Nevins v. Dunlap, 33 *N. Y.* 676 ; 1 *Story's Eq. Jur.* §§ 155, 66).

II. In this case the plaintiff not only fails to prove the basis of his complaint, that the defendant intended to assume the mortgage, but it was clearly proved by plaintiff that defendant never entered into any contract or agreement, verbal or otherwise, with, or made any promises to the plaintiff ; nor did she pay any part of the consideration. On the contrary, the contract was made by plaintiff with Mr. Leonard ; the consideration was paid by Mr. Leonard ; the deed was actually delivered to Mr. Leonard, and the deed was made to defendant simply because Mr. Leonard asked it, and because, as plaintiff understood, Mr. Leonard had made a trade with defendant. There is not only nothing to connect the defendant with the transaction but the evidence shows positively that she had nothing to do with the transaction in question.

III. There is no delivery of the deed to the defendant (*Perstetson v. Hughes*, 65 *Barb.* 134).

IV. A conveyance made "subject" to a mortgage does not bind the grantee to pay the mortgage (*Minor v. Terry*, 6 *How. Pr.* 208 ; *Binsse v. Paige*, 1 *Keyes*, 87).

V. The question of intent on the part of defendant to assume the mortgage was a question of fact simply ; and "the rule that the report of the referee, like the verdict of a jury, is conclusive as to the questions of fact, is applicable to the findings of a judge. He takes the testimony, hears and sees the witnesses, and is quite as well able as a jury or referee to arrive at a right conclusion as to the facts" (*N. Y. Superior Court, Ritter v. Cushman*, 35 *How. Pr.* 284 ; *Lewis v. Greider*, 49 *Barb.* 606).

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Opinion of the Court, by SEDGWICK, J.

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BY THE COURT.—SEDGWICK, J.—The acceptance by defendant Lynch, of the conveyance of plaintiff to her, would have held her to the performance of any agreement on her part stated therein (*Atlantic Dock Co. v. Leavitt*, 54 *N. Y.* 35; *Spaulding v. Hallenbeck*, 35 *Id.* 206), although she did not sign. In her answer in this action she denied ever accepting the deed, averring in substance, that when she conveyed the property, she supposed that the plaintiff had conveyed to Leonard and Leonard to her. The plaintiff took the position, that Leonard acted as defendant's agent when he accepted the conveyance made by plaintiff. The evidence on this issue was favorable to plaintiff, and there was no conflicting or explanatory testimony. The defendant had conveyed the land by a deed, in which her grantee agreed to pay the mortgage in question, "the same being a part of the purchase money of this conveyance." In the foreclosure action of this mortgage, the complaint alleged that Fairchild (who is plaintiff here) sold and conveyed the premises to Lynch (the defendant here) by a deed in which "the said Theresa Lynch assumed the said mortgage as part of the consideration on such purchase and agreed to pay the same." She, by her verified answer, admitted that the present plaintiff sold and conveyed to her. Further, her answer alleged, "and this defendant received the said deed. And this defendant admits that this defendant received said land subject to said mortgage," but she therein denied that she had ever agreed to pay the mortgage, and denied that under the deed to her, she was bound to pay the mortgage.

There was enough evidence, therefore, that Leonard acted as her agent in fact in accepting the conveyance, and that she thereupon became bound to perform any agreement on her part contained in it. The appellant claims that the following clause is an agreement by her



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to pay the mortgage, viz: "Subject nevertheless to a certain indenture of mortgage, given by the party hereto of the first part to secure the principal sum of \$15,000 and interest, which said mortgage is recorded, &c., and which said mortgage the party hereto of the *first part* assumes and agrees to pay, as part of the consideration hereinbefore expressed."

A correct interpretation of this is that the mortgage is to be paid by the party of the second part, without a resort to the contract which the conveyance consummated or to any other extrinsic facts. There was plainly a mistake of the pen. There is no ambiguity in the words, but there is a mistake. The manifest intent was that whoever was to pay the consideration agreed to pay the mortgage. Theresa Lynch was to pay it, and she was by an error that happens often in speech, in writing, and in printing, designated as the party of the first part. There is no doubt as to who was meant to be designated.

If it is necessary to give a rule, which justifies this conclusion, that rule is *verba intentioni et non e contra debent inservire, ut res magis valeat quam pereat*. This requires that the whole of the instrument shall be examined, and any part which is inconsistent with or repugnant to the intent of the whole instrument, as is shown with certainty by the other parts, is to be rejected or modified according to the intent.

In Jackson v. Topping, 1 Wend. 390, there was a condition that if the grantee neglected to pay certain debts of the grantor, and suffered the grantor to be put to cost or trouble on account of the same, the grantor might re-enter, &c. The case was that some of the debts had not been paid, but the grantor had not been put to any cost or trouble on account of such debts. Although the law is never more subtle and exacting than in construing a condition, so that there may be no forfeiture, the court held that in view of the whole in-



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strument the conjunction "and" should be made to mean "or," and that a mere neglect to pay the debts without more, was a breach.

In *Sanders v. Betts*, 7 *Wend.* 287, the covenant of warranty against all persons claiming "from and under him the said party of the second part" was construed so as to reject as repugnant to the rest of the covenant the words "the said party of the second part," although the legal effect would be the same, as if the words were written party of the first part (*Gardner v. Gardner*, 10 *Johns.* 47).

In *Buck v. Burk*, 18 *N. Y.* 339, the contract was to deliver goods at not above 25 per cent. of the cost price, and the court held, counsel not arguing to the contrary, that it meant, 25 per cent. over and above the cost price, inasmuch as no other rational interpretation could be given to the terms, and the nature of the transaction and the circumstances forbidding any other construction.

In *Morse v. Salisbury*, 48 *N. Y.* 637, the action involved title to land, under a written contract made by B, which purported to convey all "the land and timber excepting the hard wood on 100 acres of land." The contract was in duplicate and the other part delivered to B was the same excepting the word "bark" was in place of "land." The court looked at both parts of the contract and the whole of them, and from them adjudged that "land" was not meant to be conveyed, thereby rejecting the word "land" as repugnant to the intent as learned from the whole taken together, and making it mean "bark."

In *Bache v. Proctor*, 2 *Doug.* 383, the condition of the bond was that if A should render a fair, just and perfect account of all sums received, "the bond should be void." A rendered a just account but did not pay over the sums received. Lord MANSFIELD said that the fair construction of the condition was that A should

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pay. Justice BULLER likened the case to one in the common pleas where the condition of a bond was that it should be void, if the obligor did not pay, and the court held that the palpable mistake of a word should not defeat the true intention of the parties. Here he said it never could be meant that so large a penalty should be taken merely to enforce the making out a paper of items and figures.

In *Mills v. Wright*, 1 *Freeman*, 247, the bond was conditioned "if he do not pay the money, the bond should be void." The court said that the condition was absurd and void, but the bond was good.

In 1 *Saunders*, 66, note b, it is said that the principle has been extended to promissory notes and a note containing the words "I promise not to pay" was held to be a valid promissory note (*Bayley on Bills*, 4 Ed. p. 6). *Simpson v. Vaughan*, 2 *Atk.* 32, contains a reference to a case where the note was for "£20 borrowed and received, which I promise never to pay." The latter clause was modified by the promise implied from the first clause. In *Vernon v. Alsop*, (1 *Leo.* 77, *T. Ray*, 68, 1 *Sid.* 105, 1 *Kel.* 356, 415, 451), there was a bond, with the condition to pay £7 by two shillings a week, until the £7 were paid, and if he failed of the payment of the 2 shillings at any of the days, whereon it ought to be paid, the obligation to be void else to remain in full force. The condition was rejected and there was a recovery upon the bond, after a plea that the defendant had failed to pay, &c.

In *Furgerson v. Harwood*, 7 *Cranch*, 413, the declaration set out a contract that the said Walter delivered to the said Enos three hogsheads of tobacco, "he the said Enos to be allowed per cent. therefor, the highest six months credit price." The contract produced in evidence did not have the words "he the said Enos," and Judge STORY considered whether the contract would have been materially changed if those words had been

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in. He said that it was very clear that the word "Enos" was by a mere slip inserted instead of "Walter." It is repugnant to the sense and meaning of the contract that the creditor who received the tobacco at a stipulated price in part payment of his debt, should allow to himself that price. From the nature of the transaction the debtor must be entitled to the allowance. If the same words had been introduced into the written contract itself, they must have been rejected as nonsensical or repugnant, or have had imposed upon them a sense exactly the same as if the words had been "the said Walter." *Burr v. Broadway Ins. Co.*, 16 *N. Y.* 268, sustains the principles of these cases.

It has been hardly necessary to cite these cases, except to show that there was no need of resorting to equity, to reform the defendant's agreement for mistake, but that, where the mistake appears from the instrument itself, the law will enforce the obligation according to its true legal construction.

There can be no doubt, that the rest of the deed shows that the amount of the mortgage was part of the consideration, and from that it follows, that the mortgage, as between the parties to the conveyance, was to be paid by the defendant, the grantee.

I am therefore of opinion that the complaint should not have been dismissed, inasmuch as the plaintiff had made a *prima facie* cause of action, at law, even if there was no case for a reformation of the agreement, in equity, but that the court should have proceeded to judgment in favor of plaintiff, for the sum he had been compelled to pay on the mortgage, with interest, the defendant not having demanded a trial by jury, or raised any objection on that account.

The judgment appealed from should be reversed, with costs to appellant to abide the event.

SANFORD, J., concurred.

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Statement of the Case.

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JOHN P. O'SULLIVAN, PLAINTIFF AND RESPOND-  
ENT, v. MARSHALL O. ROBERTS, DEFENDANT  
AND APPELLANT.

I. WRITINGS, EVIDENCE.

1. INDEFINITE EXPRESSIONS.

(a.) *Extrinsic proof is admissible* to show what the parties intended to be covered by, and included in the expressions used.

1. *E. g.*, A contract called for the obtaining the "sanction" of a government to a certain organization, extrinsic proof is admissible to determine "what sanction" was agreed to be procured.

II. GOVERNMENTS.

1. *Consent or sanction of, or ratification by.*

(a.) CONTRACT TO PROCURE, WHAT IS NOT PERFORMANCE OF.

1. Obtaining an order or decree from which by a constructive implication, the desired consent, sanction, or ratification may be inferred, is not sufficient.

1. The consent, sanction, or ratification must be *express, not implied only.*

III. POWER OF ATTORNEY, EVIDENCE.

1. EFFECT OF AS CONSTITUTING A CONTRACT.

(a.) One containing recitals as to the objects for which it is made, and authorizing the performance of certain things, *does not necessarily constitute a contract for compensation* upon the performance of the authorized things.

1. That must depend on the agreement under which the power was given. If that makes compensation depend on the doing of things in addition to those contained in the power, the attorney must do the additional things to entitle him to compensation.

2. RECITALS IN, EFFECT OF.

(a.) Operate as admissions as to facts.

1. *Explanation of.* May be explained or contradicted by proof of a contemporaneous contract, or of a contract for part execution whereof the power was given.

1. *Admissions by the attorney.* A letter written by the attorney stating what in his view was the agreement, and referring to the power as setting forth the agreement so stated, *is sufficient to entitle the defendant to go to the jury*

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on the question, among others, whether the agreement was not as stated in such letter.

IV. *SATISFACTION, EXPRESSION OF; EVIDENCE; ESTOPPEL.*

1. The fact that a defendant has expressed himself entirely satisfied with the result of plaintiff's labors *does not constitute such acceptance as to prevent* the defendant from showing that plaintiff had not fulfilled his contract, and obtaining a verdict upon such showing.

(a.) It is, however, *proper evidence to go to the jury* on the question as to what the contract was and whether the plaintiff had performed his part.

Before SEDGWICK and SANFORD, JJ.

*Decided May 8, 1877.*

Appeal from judgment on verdict of jury, for plaintiff.

The action was for the value of services, alleged to have been rendered by plaintiff at request of defendant and for his benefit.

The answer, beside allegation of special matter, in substance denied generally the averments of complaint.

*Vanderpoel, Green & Cuming*, attorneys, and *A. J. Vanderpoel, C. N. Dickerson and Joseph S. Bosworth*, of counsel, for appellant.

*James H. Fay*, attorney, and *Albert Stickney*, of counsel, for respondent.

BY THE COURT.—SEDGWICK, J.—The plaintiff on the trial and here, placed himself (as to the contract), upon the effect of written papers in evidence, and disclaimed the existence of any verbal contract.

The republic of Mexico had granted to certain parties a right to build a railroad, &c., across the isthmus of Tehuantepec. Afterwards the republican government was attacked by military forces under Maximilian

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and dislodged by him from the capitol of the country. Maximilian formed what was called an imperial government and held a great part of Mexico.

The defendant wished to carry out the project of building the railroad, and made certain arrangements with the parties holding the grant, to the end that he might become the owner of it for the purpose of transferring it to an incorporation to be formed. A decision of this appeal does not call for an exact statement of these matters. The defendant at this point, wished that Maximilian should in some way confirm the franchises of the original grantees, in their transferees.

On the trial, the defendant claimed, that the purpose was to form an incorporated company to whom the grant should be assigned, and that it was agreed between himself and other persons, of whom Mr. Wikoff was one, that if the latter should procure what was desired from Maximilian, then the defendant would deliver to them \$300,000 of the stock of the proposed company, and that the 50,000 of this stock which in a certain event was to be delivered to the plaintiff, was parcel of this 300,000 shares.

In the early part of April, 1866, Mr. Wikoff wrote a form of a letter to be signed by plaintiff. The plaintiff copied it, and signed the copy, and handed this copy to Mr. Wikoff, himself keeping the draft. There was no date to it. The contents were as follows :

“ My dear Mr. Wikoff :

“ Will you please say to Mr. Roberts, that I accept the offer made by you of an amount of New York and Tehuantepec stock that will produce fifty thousand dollars, for which consideration I agree to go to Mexico and co-operate with you in obtaining the imperial sanction to the proposed company.

“ Furthermore, I desire that Mr. Roberts will associate me with you as his representative in accomplishing the proposed object.

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Opinion of the Court, by SEDGWICK, J.

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“ Finally, please arrange with Mr. Roberts, in accordance with all usages, that a liberal sum be appropriated for our joint expenses to and from Mexico.”

The plaintiff testified that on the morning of April 10, 1866, as he was about to sail for Mexico, Mr. Wikoff or the defendant handed to him a letter as follows :

“ New York, April 10, 1866.

“ My Dear Sir :

“ I approve of the proposition made to you, by Mr. Wikoff, guaranteeing to you fifty thousand dollars in stock of the projected New York and Tehuantepec Railroad and Steamship Company, in consideration of your assisting him to obtain the sanction of the imperial government of Mexico to said organization.

“ I am very happy to associate you with Mr. Wikoff in the business he has undertaken, and hope that your joint efforts will be successful, both for my sake and that of his Mexican majesty.

“ I concur when the matter is complete.

“ MARSHALL O. ROBERTS.”

The original of this had been lost, but the plaintiff testified that all but the last sentence was in the writing of Mr. Wikoff, and that sentence was in the writing of the defendant. The defendant denied that he had signed this letter.

As to these two papers, the court charged that if there were no evidence of some modification at a later time, they formed, in themselves, a complete contract between the parties, that they were substantially the same in effect, and that even if the jury should find that the defendant had not signed the second, still he had (as a conclusion from evidence in the case), acknowledged Wikoff to be his agent, to make a contract of the kind set forth in the first, so that the first paper was evidence of a contract, all of whose terms were therein expressed.

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Opinion of the Court, by SEDGWICK, J.

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The testimony did not show that the defendant had ever seen the first paper, and I am of opinion that the learned judge went too far in charging that, as matter of law, the admissions of defendant conclusively showed that Wikoff was defendant's agent to make a contract for him of the kind set forth in that first paper. These admissions are in the answer and in letters written by defendant. Whatever detached sentences there may be, that by themselves might justify an inference that Wikoff was acting for Roberts in making the arrangement with plaintiff, still all I think should be considered with the position that from the first to the last the defendant takes and persistently reiterates that it was Wikoff as a principal who made the arrangement, in order to successfully accomplish what Wikoff and others had undertaken with defendant.

It is entirely consistent with this that the defendant had promised, by a separate obligation, to deliver the stock as stated in the answer. Be that so, it does not necessarily prove that Wikoff in the first acted as Roberts' agent. It rather intimates the contrary.

And if the defendant did sign the second paper, I do not think that would conclusively show that Wikoff acted as defendant's agent in making the arrangement referred to, in the first paper. On that point, proper consideration should be given to the peculiar phrases of the last sentence, as throwing light upon the intention of defendant to indicate that he did not mean to hold himself out as a principal actor in all that was referred to in the part written by Wikoff, although at the same; he would be bound to the special obligations that flowed from his concurrence. It would not be right to attempt to construe this letter, for counsel have not yet reached the point of examining what plaintiff's rights are, if they rest upon that letter.

It might be important to see if the compensation



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Opinion of the Court, by SEDGWICK, J.

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intended by \$50,000 in stock of the projected "company" is the same as intended by "an amount of stock that will produce \$50,000," but a decision of this appeal does not involve this question, and counsel have not argued it, except incidentally. For a like reason, no attention will be given to the measure of damages, if the defendant were bound to deliver to plaintiff \$50,000 in stock of the company.

It can hardly be doubted that the two letters describe the same object to be accomplished by the plaintiff and Wikoff. The one is "in obtaining the imperial sanction to the proposed company." The other is "to obtain the sanction of the imperial government of Mexico to the said organization." The plaintiff was bound to prove that he had secured that, before he could claim compensation. The court impliedly held the law to be, that by a proper construction the plaintiff performed this service, when he procured, as he proved, from Maximilian "permission to the Louisiana Tehuantepec Company . . . that it may transfer the residence of its directorship from New Orleans to New York, and change its name to that of New York and Tehuantepec Railroad and Steamship Company." I use the words "impliedly held this to be the law," to avoid the statement of several parts of the charge to which specific exceptions were taken. The defendant claimed that the service described included, in addition to change of name, &c., the obtaining of the consent of the emperor to an assignment by the first grantees of its franchises to the proposed company. I am of opinion that the phrase "obtaining the sanction of the imperial government," may include all these things. Certainly if any one were obtained, there would thereby be a sanction of some kind. Proof, extrinsic of the letters, could probably be given to show to what the parties intended this sanction to apply, in order to determine what sanction was agreed to be pro-

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Opinion of the Court, by SEDGWICK, J.

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cured. The learned counsel for plaintiff claims, that a consent to an assignment is implied in the consent given by the emperor, and that the emperor must be held to have assented to all the purposes which he knew were meant by the parties to accompany the change of name and of residence. The implication is not direct, but is inferred, and rests upon a construction that would be given by the political body who made the concession, not subject to the jurisdiction of courts. The parties must have intended that the sanction was to be express and not only implied.

The court further held that the testimony to support this claim of defendant was such as related to a power of attorney, as to which some facts should be stated, further holding at the same time, that but for this power, the plaintiff was only bound to procure the sanction as stated in the letter, viz., to a change of name and residence.

When the plaintiff started for Mexico first, he was accompanied by Mr. Wikoff, who took a power of attorney made by the defendant to him. The steamship was wrecked upon the coast, and both plaintiff and Mr. Wikoff came back to this city, and saw the defendant. The only thing done then, that refers to the question here, was that Mr. Wikoff, with the consent of the parties, withdrew from the proposed journey to Mexico, and the plaintiff was to proceed alone. The plaintiff began his second voyage to Mexico on April 25, 1866. On May 9, a power of attorney, the same in its words as that given to Mr. Wikoff, excepting that the plaintiff's name was inserted in Mr. Wikoff's stead, was executed by defendant. The plaintiff received this in Mexico in May, June, or July, and he thinks in June.

This power recited that whereas the defendant desires "the permission and sanction of the imperial government of Mexico to change the name of said company and to call it the New York, Tehuantepec and Pacific

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Railroad and Steamship Company, and to carry out the purpose above mentioned with the imperial government of Mexico, the said Marshall O. Roberts has appointed and by these presents does appoint J. P. O'Sullivan his attorney, in the name and stead of the said Roberts to negotiate with said imperial government of Mexico to change the name of the said company as above mentioned, and to transfer the rights and powers, property, franchises, charters of every name and nature of the said Louisiana and Tehuantepec Company with the New York, Tehuantepec and Pacific Railroad and Steamship Company."

I think there can be no doubt that such a power of attorney is not conclusive evidence in its terms of what services the person named as attorney was to do, to entitle him to compensation. Its declarations are in the nature of admissions as to facts, but it is not a contract, and proof of a cotemporaneous contract may explain or contradict the admissions. The attorney may not be entitled to compensation if he does only what is recited as the motive of the principal to make the power, if he has elsewhere contracted to do something more. In the present case, the recital is not conclusive evidence that the meaning of the parties in the phrase "imperial sanction to the proposed company," in the two letters (even if they contained the contract), was that there should be imperial permission to change the name of the company, and to do nothing more. Nor do I perceive that the purpose of the party is manifested more decisively by the statement of his wish in a recital, than it is by the statement of what the attorney is authorized to do. This shows a desire that the attorney should do the authorized things in a proper case.

Nor was it a necessary conclusion of fact in the case, that the plaintiff had never made his compensation depend among other things, upon procuring a sanction to

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the assignment to the proposed company before the power reached him in Mexico, if he did so at that time, because the plaintiff in his letter of May 18, 1867, to defendant writes: "I was called upon by Mr. Wikoff acting for you, and solicited to go to Mexico to undertake to procure by the imperial government the necessary ratification (and permission to change the name of the Louisiana and Tehuantepec Company) of the sale of said company's rights, titles, interests, etc., to yourself, as is already distinctly set forth in your power of attorney to me." This was such an admission as gave the defendant a right to go to the jury for their verdict, as to what was the original agreement, and also whether the plaintiff had not known the contents of the power to Wikoff at the first, and also had not known before he started the second time, what were to be the contents of the power to be sent to him in Mexico. I am therefore of opinion that it was for the jury to say, whether the power, considered with the other facts of the case, was evidence of anything more than of what was the original agreement. If they had found that it was not, then there would have been no basis for the plaintiff being entitled to recover for the value of his services, on the ground that the original contract had been modified. In that event, the plaintiff or the defendant, would have had the benefit of a decision as to whether or not the procuring of the decree from Maximilian was or was not a satisfaction of the plaintiff's obligation to procure his consent to an assignment of the franchises, &c.

Upon the question, as to whether defendant was not entitled to go to the jury, as to the nature of what was to be done by the plaintiff by the original agreement, reference should be had to the testimony of plaintiff that defendant expressed his entire satisfaction with the decree that the plaintiff had obtained. This interview required a construction by the jury. It did not con-

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Statement of the Case.

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stitute such an acceptance by the defendant of what was done, that if the jury should find that the original agreement called for something else, they should also find that the plaintiff had performed the service. There was nothing to estop the defendant from showing what the fact really was. It was no waiver by defendant of any right. The contract had been fulfilled or it had not been fulfilled. It was not then executory. Nothing that the defendant then said could have led the plaintiff to omit to do anything, which if done, might have given him a further right.

But it was evidence to go the jury as to the original contract, and as to whether the plaintiff had performed his part of it.

I am therefore of opinion that there should be a new trial, the judgment being reversed with costs to appellant to abide the event.

SANFORD, J., concurred.

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FRANCIS J. TUOMEY, PLAINTIFF, v. JACOB  
DUNN, DEFENDANT.

I. LANDLORD AND TENANT.

I. Tenant holding over after expiration of term.

(a.) *Effect of.* The law implies an agreement to hold for another year on the terms of the prior lease.\*

I. REPELLING IMPLICATION. — ACT OF GOD.—  
SICKNESS.

1. Prior to May 1, 1875, defendant was in possession under a lease, the term whereof expired May 1, 1875, and the rent reserved thereby being payable quarterly on the usual quarter days. After May 1, 1875, de-

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\* NOTE.—This proposition was conceded by the counsel; and necessarily results from the ground on which the decision is placed.

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Statement of the Case.

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defendant held over and continued in possession until May 11, 1875, when he moved out. This action was brought to recover a quarter's rent, falling due August 1, 1875, at the rate reserved by the lease which expired May 1, 1875. The defense was that defendant was prevented from yielding up possession before May 11, by the act of God, in afflicting a cousin of defendant's wife, who was a member of his family, with a malady which confined her to her bed, and which was so great that it would have endangered her life to have taken her from the house. On the trial, after the evidence on both sides had been closed, the court directed a verdict for plaintiff. At general term this direction was sustained, on the ground that the evidence failed to establish the facts constituting the defense pleaded, the court saying: "*this placing the decision on the evidence is not meant to imply that, if there were danger to her life or health in moving her, the defendant would not have been liable.*"

Before SEDGWICK and SANFORD, JJ.

*Decided May 8, 1877.*

Exceptions ordered to be heard in first instance at general term.

The action was for rent of a dwelling-house, for the quarter beginning May 1, 1875. The defendant had been tenant for the previous year, and had held over and remained in possession until May 11, 1875, when he moved with his goods and family from the house.

The defense was, that the defendant intended to leave at the end of the first year, but was prevented from doing so by illness of his wife's cousin, a member of the family, which was so great that it would have endangered her life to have taken her from the house.

The court held that this was no defense, and the jury gave a verdict for plaintiff, and judgment was stayed, with an order that the exceptions be heard in the first instance at general term.

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Opinion of the Court, by SEDGWICK, J.

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*George A. Black*, for defendant.

*William H. Newman*, for plaintiff.

BY THE COURT.—SEDGWICK, J.—The testimony given came short of proving that the holding over of defendant was involuntary on his part, even if that were finally to be determined by his consideration of the state of health of the lady who was sick. There was no proof that her life would have been imperiled or her illness aggravated by her leaving the house on or shortly before the first of May. The physician did not see her from April 22 until May 3. He gave some not very positive testimony that her state on May 3 was such as to make it hazardous to remove her. He did not remember whether she was confined to her bed on the 22nd day of April, and he testified that he couldn't say, that on the first day of May she could not have been moved without hazard to her health. This, with the testimony of her relatives as to her health, would not have justified the jury in saying that this defendant had proved that she could not have been removed safely.

This placing the decision upon the evidence, is not meant to imply that if there was danger to her life or health in moving her, that the defendant would not have been liable.

The exceptions are overruled, and judgment for plaintiff is ordered to be entered on the verdict with costs.

SANFORD, J., concurred.

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Statement of the Case.

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JOHN W. EARL, PLAINTIFF, v. ALFRED N.  
BEADLESTON, DEFENDANT.

I. PARTY WALLS.—TAKING DOWN ONE OF THE BUILDINGS.

1. RIGHTS AND LIABILITIES OF THE PARTIES RESPECTIVELY INTERESTED THEREIN.

(a.) Neither party can of his own head do or cause anything to be done which will weaken the wall perpendicularly.

(b.) LIABILITY FOR DOING OR CAUSING SUCH THINGS TO BE DONE.\*

1. *If the necessary consequence* therefrom is to weaken the wall that interested party who did or for whom the things were done, will be liable for the damages sustained by others; and that whether the things were done by his own hand, or the hands of others hired by him, or by the hands of workmen employed by one who had contracted with him to perform the work.

(a.) RESPONDEAT SUPERIOR.—Doctrine of does not apply.

2. If the weakening of the wall *be not the necessary consequence therefrom*, but results only from want of care and skill in doing the work, the party interested in the wall is *not liable* for damages resulting from the want of care and skill, on the part of the workman employed by one who has contract with him to do the work.

(a.) RESPONDEAT SUPERIOR.—Doctrine of applies.

I. *When not a necessary consequence.* The act and operation of *tearing down one of the two buildings, whose beams rest in the wall, does not involve, as a necessary consequence*, the weakening of the walls. It may be taken down by the use of ordinary care in such manner as to leave the wall as strong as it was. Therefore, under a contract to "take the build-

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\* NOTE.—Would the fact that the things were done pursuant to the requisitions of a public officer duly authorized by the legislature to make such requisition, relieve the party from liability?



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Statement of the Case.

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ing down," the owner who gave out the contract is not liable for injuries sustained through the weakening of the wall, by the careless or unskillful performance of the work, on the part of the workmen employed by the contractor.

1. NOTICE.—Not necessary in such case to give notice of the intention to take down the building.

Before CURTIS, Ch. J., SEDGWICK and SPEIR, JJ.

*Decided May 8, 1877.*

Exceptions ordered to be heard in first instance at general term. Verdict for plaintiff, with stay of entry of judgment.

The plaintiff and the defendant were the owners, respectively, of two adjoining lots with houses thereon. Between these houses was an ancient party-wall, standing equally on the two lots. The house of defendant became decayed and in an unsafe state, and for that reason the department of buildings in the city of New York, being duly authorized therein, notified and required the defendant to take down his house or to make it safe. The defendant thereupon entered into a contract with one Macgregor, that the latter should take down the defendant's house. By the evidence, the contract was verbal, and was that Macgregor should "take the building down."

The action was for damages to plaintiff from the falling of his building, caused by the party-wall being weakened in consequence of acts of Macgregor's workmen. By stipulation between the parties in making the case, there was sufficient evidence to support the verdict of the jury on the following points: 1st. That there was negligence on the part of the workmen of Macgregor when engaged in tearing down defendant's building. 2nd. That the party-wall was weakened by

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Plaintiff's points.

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the removal of materials therefrom by the workmen when engaged in tearing down defendant's building, and that the building of the plaintiff fell in consequence of the party-wall having been so impaired and injured. 3rd. That damage resulted to plaintiff from such negligence, and that the amount found for plaintiff was not excessive.

On the trial the defendant asked first that the complaint should be dismissed, on the ground that defendant was not liable for damage caused by the negligence or unskillfulness of the workmen of Macgregor. This motion was denied, and exception was taken. Afterwards the defendant asked the court to charge the jury that the defendants were not liable for such damage. This was refused, and exception was taken.

The court in charging the jury, held, "that the manner of the taking down of defendant's building, not having been regulated by a contract which preserved the rights of the plaintiff in the party-wall, and no notice having been given to the plaintiff that such work would be done, the defendant is liable for the consequence of the acts of commission and omission of all those when he employed or caused to be employed to tear down his building, in so far as those acts worked an injury to plaintiff's building." The defendant excepted to this.

The jury found for the plaintiff.

*Geo. W. Carpenter*, attorney, and *Daniel T. Waldon*, of counsel, for plaintiff, urged :—I. When buildings are erected with a party-wall between them, each owner has an easement for the support of his building in the whole of the party-wall (2 *Washburn on Real Property*, 276, 334; *Eno v. Del Vecchio*, 4 *Duer*, 53; S. C., 6 *Duer*, 17; *Partridge v. Gilbert*, 15 *N. Y.*, 601; *Brooks v. Curtis*, 50 *Id.* 639; *Dowling v. Hennings*, 20 *Md.* 179-184).

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Plaintiff's points.

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II. The adjoining owner is bound to recognize this right of his neighbor, and it is his duty to see that it is not impaired; he may use the wall, or he may add to it and repair it, and remove his building, but he cannot interfere with the wall in any manner, unless he can do so without injury to the adjoining building. So far as his acts tend to affect the party-wall, "he acts at his peril, and must insure the safety of his operations (*Eno v. Del Vecchio*, 4 *Duer*, 53; 6 *Id.* 17; *Brooks v. Curtis*, 50 *N. Y.* 644, per RAPALLO, J., and cases above cited; *Washburn on Servitudes*, 572, 573, 575, 576; *Hunt on Boundaries, &c.*, 114, 115, 116; *Tyler on Boundaries, &c.*, 355).

III. The cases relating to the liability of a person for the negligence of another who stands to him in the relation of an independent contractor, and not of servant, has no application to this case (*WOODRUFF, J.*, *Eno v. Del Vechio*, 6 *Duer*, 28). If the person for whom the work is done, is under a pre-existing duty or obligation to have the work done in a particular manner, he cannot be discharged from that duty, by creating between himself and another, the relation of employer and contractor, and so casting upon the latter the burden of his own responsibility. He is bound to see that the duty is performed (*Storrs v. City of Utica*, 17 *N. Y.* 104; *Hole v. Sellingbourne, &c. Railway Co.*, 6 *Hurlst. & Norman*, 488, 497; *Pickard v. Smith*, 10 *C. B. [N. S.]* 470, 479, 480; *Mersey Docks v. Gibbs*, *L. R. [1 E. & I. Appeals]* 93, 114, 115; *Francis v. Cockerill*, *L. R. [5 Q. B.]* 184; *Shearman & Redfield on Neg. [3d Ed.]* §§ 15, 85, 175; *Wharton on Neg.* § 185; *DWIGHT, J.*, *McCafferty v. S. D. & P. M. R. R. Co.*, 61 *N. Y.*, 186, 187, &c., &c.; *Hunt on Boundaries*, 116, 117).

IV. The defendant in this case was entirely unmindful of his duty to his neighbor; he authorized a third party to remove the building, and gave him as com-

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Plaintiff's points.

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pensation the old materials; the agreement was broad enough to include and permit the contractor to take away the party-wall, with all the materials in it; certainly to remove the materials of the building which were in the wall. His workmen did remove such materials from the party wall; thus weakened it and caused the plaintiff's building to fall. The defendant did not in any way obligate the contractor to respect the rights of the plaintiff, or take any precaution that he should not be interfered with; he left the contractor to do as he pleased; and even invited him to remove all the materials he could, by giving them to him as a reward for his labor. The contractor acted within the terms of his employment, and the defendant is responsible as if he did the act himself. "When the injury results directly from the acts which the contractor agrees, and is authorized to do; the person who employs and authorizes him to do those acts, is equally liable to the injured party" (*Ibid.*; *Ellis v. Sheffield Gas Co.*, 2 *E. & B.* 767; *Water Co. v. Ware*, 16 *Wall.* 576, per CLIFFORD, J.; *Robbins v. Chicago*, 4 *Id.* 679; *Packard v. Smith*, 10 *C. B.* [*N. S.*] per WILLIAMS, J., 480; *Wharton on Neg.* §§ 186, 187).

V. The plaintiff's consent was not asked or obtained, nor was the plaintiff notified, that the defendant intended to do the work, and the plaintiff did not know that the building was being taken down, until after it was taken down. The defendant was bound to give notice to the plaintiff, even if necessity existed to remove the wall; and removing it without such notice, makes him liable for all such consequences which might have been averted (See cases above cited; *Partridge v. Gilbert*, 15 *N. Y.* 601).

*R. W. Townsend*, attorney, and *A. R. Dyett*, of counsel, for defendant.

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Opinion of the Court, by SEDGWICK, J.

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BY THE COURT.—SEDGWICK, J.—There is no denial that the defendant had the right at his pleasure to take down his own house, excepting such part of it as was portion of the party-wall, and the ends of the beams in the wall. If the weakening of the party-wall perpendicularly was a necessary consequence of the taking down of the house, then, the party-wall itself not having fallen into decay, the defendant would be responsible for the damage, whether he hired workmen to pull the building down or did it through a contract. If it were not a necessary consequence but a highly probable one; for instance, if it would follow, unless precautions, beside care and skill were taken, then, whether the defendant would not have been bound to take these precautions, or at least to have given notice to the plaintiff that he might take them, is not a question in this case. There was no proof as to the probable consequences of taking defendant's building down, and there is no inference to be drawn from the fact of a building having its beams in a party-wall that it could not be done without weakening the wall or taking out the ends of the beams in the wall. So the case is that the building might be taken down by the use of ordinary care, and the wall be left as strong as it was; and the immediate question is, if the defendant made a contract with Macgregor to take the building down, is the defendant responsible for the workmen of Macgregor weakening the party-wall by their negligence or unskillfulness. I think the answer must be that the negligence was the negligence of Macgregor, and not of the defendant. Macgregor's workmen were his servants. They were not the servants or agents of the plaintiff.

Button v. Hunter, 7 *Hurl. & N.* 726 (1862) was cited in McCafferty v. S. D. P. M. R., 61 *N. Y.*, 183, by the judge delivering the opinion of the court. The case applied well-known principles, and may properly

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Opinion of the Court, by SEDGWICK, J.

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be used to determine the present case. The defendant was the owner of a house adjoining the plaintiff's house, and between the two houses was an ancient party-wall. The defendant made through his architect a contract with another to have the front wall of defendant's house taken down. In this front wall was a breast-summer,\* which extended six inches into the party-wall and proper workmanship required that before the breast-summer be removed, the plaintiff's house be shored. The contractor through his workmen took out the beam without shoring up, which caused plaintiff's house to be injured. It was adjudged that the defendant was not liable, on the ground "that there was no evidence that the defendant stood in the relation of master and servant to the persons whose negligence caused the injury." The judges considered the proposition, "that where a person employs tradesmen to do a work which may be dangerous to another, he is bound to show that he directed all care to be taken, and specifically pointed out in what way the danger was to be guarded against, or at all events did enough to exempt himself from responsibility," but said that "it must be assumed that directions were given in the ordinary way, and to take all proper precautions not to do mischief." It was further remarked that it "is said that the defendant ought to have given orders to do the work in a tradesmanlike manner, or ought to have pointed out what was required. But it seems to me, that it would be unreasonable to require an unskilled person to point out to a skilled person in what way the work should be done. I think that, as matter of fact, if a man gives an order to a tradesman to do

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\* Breast-summer is a summer or beam placed breast-wise to support a superincumbent wall used principally over shop-windows to carry the upper part of the front, and supported on posts or columns.—WEBS.

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Opinion of the Court, by SEDGWICK, J.

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some work, he means to do it in the ordinary tradesmanlike way.”

The substance of these considerations, as applied to this case is, that the defendant had contracted to have the house pulled down in a manner that would not have been an injury to plaintiff's rights. The contract therefore does not make him liable. When the contractor's servants went beyond this contract, and damaged the wall by unskillfulness, they had not been thereunto authorized by plaintiff, and were not his servants or agents.

If the plaintiff's contract had been, that the building, including a part of the party-wall, should be taken down, of course there would have been responsibility for damages ; but the court, on the evidence, properly, in his charge to the jury, assumed that the contract did not refer to the party-wall.

The liability of defendant has been stated as if he, of his own head, had taken down his building. The fact was, that he did it in obedience to the direction of a public officer. The specific duty thereby created did not enlarge the duty he was before under to the plaintiff.

I do not see that the parties' rights are affected by the defendant not giving notice to the plaintiff of his proposed action. The defendant was enjoying a right of property which, on the evidence, was not likely to cause damage to plaintiff. There was nothing to be done by plaintiff in the matter, to avert events which were not anticipated, or likely to happen.

I am of opinion that the exceptions should be sustained, and a new trial had with costs to the defendant to abide the event.

CURTIS, Ch. J., and SPEIR, J., concurred.

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Statement of the Case.

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ABRAHAM NEWFIELD, PLAINTIFF AND RESPONDENT, ALSO APPELLANT, v. HAYMAN COPPERMAN, DEFENDANT AND APPELLANT, ALSO RESPONDENT.

I. *LIBEL.*

1. PRIVILEGED COMMUNICATIONS.

(a.) The fire marshal of the city of Brooklyn, acting on information received by him from a party other than the defendant, subpoenaed the defendant to appear before him upon an inquiry in relation to a fire which had occurred in Brooklyn, and upon defendant appearing, asked him various questions and reduced the answers (which were relevant and material to the subject matter of the inquiry), to the form of a written deposition, to which he swore the defendant:

HELD,

An action of libel would not lie against the defendant, founded on statements contained in the deposition, tending to charge plaintiff with arson, and this, even conceding such statements to be false.

II. *MALICIOUS PROSECUTION.*

1. WANT OF PROBABLE CAUSE, PROOF OF, NECESSARY.

(a.) Taking the plaintiff's case that the above *deposition was used as the foundation of a groundless prosecution*; yet, as no proof of want of probable cause was given, the complaint was properly dismissed.

Before CURTIS, Ch. J., SEDGWICK and SPEIR, JJ.

*Decided May 8, 1877.*

Appeal from judgment on verdict in favor of plaintiff.

An order had been made at special term on a case by the judge who tried the cause, granting a new trial, and at this time was argued the appeal of plaintiff from the order granting a new trial.

The complaint alleged that on or about May 30,



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1871, a fire broke out in the premises of another person and spread to and destroyed the property of the plaintiff, on which he had insurance ; that the defendant, on June 7, before Patrick Keady, Police Fire Marshal of Brooklyn, did falsely and maliciously make the following oath or deposition to wit :

City of Brooklyn, County of Kings, ss. :

Hayman Copperman, sworn, says: I live at 192 Canal street, New York, and know Abraham Newfield (meaning this plaintiff), who kept a wadding factory at 64 and 66 Boerum street, Brooklyn. About two months ago, on a Saturday night, after ten o'clock, Newfield came to my house with Samuel Joseph, and asked me to allow them to come in ; Wagner and Schneider's furniture factory was on fire at the time, and they said they thought my home was burning, and they came to see ; I let them in, and they and I stood by the window looking at the fire ; while there, Newfield said to Joseph—"How would wadding burn ? Suppose my factory got on fire, how would it burn ?" Joseph said, "Why do you ask me ? Do you want to set your factory on fire ?" Newfield said "There were so many fires now that it was very dangerous, and after a while he would see how things would be," Joseph said Newfield had had several before. I asked Joseph why he asked that question of Mr. Newfield, and he replied, that he asked it because Newfield had several fires in his place before. Before that fire, I knew Mr. Newfield well ; he told me he wanted to dispose of his factory, but could not ; he said he offered it to his foreman, but the foreman would not take it. I have known Mr. Newfield for two and one half years in New York ; never did business with him ; he owes me nothing, and I have no ill feeling towards him ; that is all I know about the matter.

HAYMAN COPPERMAN.

Sworn to before me, this 7th day of June, 1871,

P. KEADY, *Police Fire Marshal*.

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That defendant intended by said oath or deposition to maliciously and falsely charge that the plaintiff had willfully set fire to his property, with intent to defraud the insurance companies who had made insurance; that "in consequence" of said deposition the plaintiff "had been summoned before said fire marshal, and on examination had before him said charge was by said fire marshal, who had jurisdiction in the premises, duly dismissed as unfounded and made without any reasonable or probable cause, to the damage of the plaintiff."

The answer was a general denial, and as a distinct defense, that the defendant appeared before the fire marshal in obedience to a subpoena, theretofore duly issued by the fire marshal, and which was served upon defendant; that thereupon said defendant was examined under oath by the fire marshal touching said fire, who took down defendant's answers in writing, which writing defendant believed to be the deposition set out in said complaint.

On the trial, it appeared by plaintiff's case, that the defendant had been called to the office of the fire marshal by a communication addressed to him and signed by the fire marshal. When he called, the fire marshal showed him the deposition set out in complaint. Thereafter the fire marshal made investigation into the cause of the fire that destroyed plaintiff's property. The fire marshal said charges had been made against the plaintiff for the fire. After an examination of the plaintiff, no further legal proceedings were taken against him.

The fire marshal was called as a witness, and proved that the investigation was founded upon information, received by him from one Davies; that thereupon he caused a subpoena to be served upon the defendant, who appeared under it, and upon request stated the matter set out in the deposition, which was reduced to writing by the fire marshal and signed by the defendant.

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Opinion of the Court, by SEDGWICK, J.

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The plaintiff testified that the matters stated in the depositions were untrue. The defendant and Joseph, named in the deposition, swore that they were true.

The judge on the trial held that there was no cause of action for malicious prosecution shown, but the plaintiff might recover as for libel, provided the jury should find the evidence sustained it. He therefore sent the case to the jury as one of libel, and the jury found for plaintiff.

Upon a motion for new trial the judge considered that the defendant was not liable as for libel, inasmuch as it consisted of his testimony as a witness in a judicial proceeding as to matters pertinent to the inquiry, and granted a new trial.

*Lewis B. Sanders*, for plaintiff.

*James C. Spencer*, for defendant.

BY THE COURT.—SEDGWICK, J.—On the allegations of the complaint, and the testimony of the fire marshal, as to which there was no contradiction, it appeared he had competent jurisdiction to examine witnesses in the investigation pending before him; that the defendant did not set on foot that investigation, but simply gave testimony in answer to questions of the fire marshal, after a subpoena had been served. The matters stated were relevant and material to the subject matter of the inquiry. I therefore think that the learned judge was right in holding that no action will lie upon the falsity of the evidence. The cases cited fully support the position (*Perkins v. Mitchell*, 31 *Barb.* 461; *Marsh v. Ellsworth*, 50 *N. Y.* 309; *Gan v. Selden*, 4 *Id.* 91).

If the matter of the alleged libel were irrelevant and immaterial to the charge of arson against the plaintiff, then clearly it was not a libel. There is no charge of

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crime and no tendency to convince any one that a crime was committed.

I am further of opinion, that if the contents of the deposition are libelous, being statements of some matters of remote circumstantial evidence, and if the signing, at the request of a judicial officer, is such a writing that the oral slander becomes a libel, and if the communication to the public officer, is a publication technically (as to which questions no decision is meant to be intimated), still, so far as the case for the plaintiff went, the deposition was the complaint or the foundation of the charge, and the damage arising from it to the plaintiff was only its tendency to set upon foot and establish a groundless prosecution. There was no proof of a general publication, or a publication beyond its being made before a judicial officer, and its being shown to the plaintiff himself (*Lyle v. Classon*, 1 *Caines*, 580; *Waistel v. Holman*, 2 *Hall*, 173; *Snyder v. Andrews*, 6 *Barb.* 43). In such cases, I understand the law to be (*Howard v. Thompson*, 21 *Wend.* 319), that plaintiff must show a want of probable cause for the prosecution itself. If there were probable ground for the prosecution, this defendant suffered no damage by the false statement of circumstantial evidence. There would be *injuria absque damnum*.

For this reason I think, that after it appeared, as it did on the trial, that there was no proof of want of probable cause for the institution of the investigation, the complaint should have been altogether dismissed, and not held as in an action for the libel.

There was no question upon the trial as to whether the libel having been under an oath competently administered its falsity could have been established by a less *quantum* of evidence than would have been necessary to prove the defendant guilty of perjury under an indictment.

The order granting a new trial should be affirmed,

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Statement of the Case.

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and the judgment on the verdict be reversed with costs to the defendant to abide the event.

CURTIS, Ch. J., and SPEIR, J., concurred.

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DAMIAN SILVA, PLAINTIFF AND RESPONDENT,  
v. THE METROPOLITAN DRUG COMPANY,  
DEFENDANT AND APPELLANT.

I. CORPORATIONS.—EVIDENCE.

1. OFFICERS.—POWER OF, TO BIND COMPANY.

1. *Admissions.*

(a.) In the case at bar the issue was whether the clerks of the defendant had authority to purchase the goods in question on credit. Plaintiff proved that after a dispute on this question had arisen, the secretary of the company referred him to the president, who, after examination, promised to pay the demand.

HELD,

evidence as against the corporation that the clerks were authorized to buy on credit.

2. *Ratification.*

HELD,

that the president had power to ratify the acts of the clerks, though originally unauthorized; and that said promise operated as a ratification.

HELD FURTHER, that the promise was sufficient to sustain the denial of a motion to dismiss the complaint, and a verdict in favor of plaintiff.

Before SEDGWICK and SPEIR, JJ.

*Decided May 8, 1877.*

Appeal from judgment on verdict of jury for plaintiff.

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Opinion of the Court, by SEDGWICK, J.

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*George R. Carrington*, for appellants.

*Abraham Hirshfield*, for respondent.

BY THE COURT.—SEDGWICK, J.—The action was for goods sold and delivered to defendants. They were bought by clerks of defendant on account of the latter, and on credit. Part of them were delivered by plaintiff at the store of defendant, and the rest was seen by plaintiff, in the show case of defendant. The defendant gave evidence to show that on all occasions, when the clerks were sent for the goods, they were directed to buy for ready money, and it was furnished to them. This testimony was given by the secretary of defendant, who also said that he had sole charge of purchasing for the defendant. A motion was made to dismiss the complaint, on the ground, that by the uncontradicted evidence it appeared that the clerks had no authority to buy on credit. The motion was denied, and exceptions taken. The decision of the court was sustained, if not by the general facts, at least by plaintiff's testimony, that after a dispute had arisen as to the purchases on credit having been authorized by defendant, the secretary of the company, when the claim was presented by plaintiff, referred him to the president, and the latter, after examination, promised to pay the demand. The president had power to ratify the acts of the clerks as the company's agents, if the promise made by him did not give plaintiff a cause of action. The promise was not only an admission as to past facts, but was an act done, a promise made within the scope of the officer's agency. The questions of fact in the case were submitted to the jury in a proper manner.

The judgment should be affirmed, and also the order denying a motion for new trial, with costs.

SPEIR, J., concurred.

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Statement of the Case.

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GEORGE P. LAWRENCE AND JOHN C. GILES,  
PLAINTIFFS, v. MARTIN GALLAGHER AND  
DANIEL LANE, DEFENDANTS.

1. *BROKER—FOR THE SALE OR PURCHASE OF PERSONAL  
PROPERTY.*

1. AUTHORITY TO BIND HIS PRINCIPAL BY A WRITTEN CON-  
TRACT, IMPLIED FROM HIS EMPLOYMENT TO SELL OR BUY.

1. Only where he effects a sale or purchase pursuant to the  
oral instructions of his principal.

(a.) IT RESULTS,

1. That he cannot, by writing, bind his principal to  
any contract other than such as he was employed to  
make.

2. That if he simply brings the parties together, and  
they make the agreement themselves, he has no im-  
plied authority to make a written contract, bind-  
ing on them or either of them, although he was  
present and took part in the bargaining.

2. AUTHORITY MAY BE OTHERWISE CONFERRED.

1. If he, having brought the parties together and they having  
themselves made the agreement, proceeds to reduce the  
agreement to writing, with their knowledge and assent, an  
authority so to do would be implied.

(a.) The mere act of writing in the presence of the par-  
ties would not show knowledge on their part ; but is  
one fact to be considered in connection with others.

2. In determining what authority was thus conferred, the  
facts, which would justify the jury in thinking that a  
bought note, made by the broker, was so made with the  
knowledge and assent of the purchaser, should be consid-  
ered in determining whether it was not a part of the under-  
standing of the parties under which the bought note was  
made, that the broker should also make a sold note  
which should bind the seller.

(a.) *If it was the understanding that such sold note was also to  
be made, then, unless it was so made, there is no consideration  
for a bought note made by the broker.*

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Statement of the Case.

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3. BOUGHT NOTE, STATING THAT THE BUYER IS TO BUY. — EFFECT OF ACCEPTANCE OF BY BUYER.

1. Not conclusive that seller has promised to sell.

(a.) It is only one fact to be considered.

II. FRUIT.

1. SALE OF CARGO TO ARRIVE.

1. No reason for applying thereto any other rule of law than is applied to a sale of a cargo of iron or grain.

(a.) An undivided interest may be sold, and delivered either by a fair division or the delivery of a bill of sale to pass the title *in presenti*.

III.—CONTRACT—EXTRINSIC PROOF AS TO EFFECT OF, AND MEANING OF EXPRESSIONS USED THEREIN.

1. USAGE TO VARY, INADMISSIBLE—WHEN.

1. Where the contract, by unambiguous terms, is in a certain event to clothe one of the parties thereto with the rights of an owner of certain property, the subject of the contract, a usage which would annul such right is inadmissible.

2. INDEFINITE EXPRESSIONS USED IN.

1. Evidence is admissible to show the sense in which they were used by the parties ; and under a proper state of evidence it becomes a question of fact for the jury to determine in what sense they were used by the parties.

3. "USUAL TERMS"—"USUAL CONTRACT."

1. An expression in a contract of sale and purchase of articles (otherwise clearly expressed), that the same is made "on the usual terms" or "by the usual contract," is *indefinite and uncertain*. It may refer

1. To the terms on which payment and delivery are to be made ; or,

2. That the interests of the various co-owners of the property should be settled as they were usually in the trade.

*Therefore evidence is admissible to show in what sense the parties used the expression.*

(a.) FACTS NECESSARY TO BE ESTABLISHED TO PERMIT A JURY TO FIND AS AGAINST A DEFENDANT THAT THE EXPRESSION WAS USED IN THE LATTER SENSE.

1. That there was a practice in the trade respecting the settlement of the interest of the various co-owners of the article which is the subject of the contract.



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Statement of the Case.

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This practice need not amount to a legal custom or usage.

2. That the defendant knew what the practice was.

3. That the defendant meant to refer to the practice by the general words used.

**IV. PROMISE TO PAY MADE SUBSEQUENT TO THE ACCRUING OF THE ALLEGED LIABILITY.**

**1. EFFECT OF.**

1. *Contract void by statute of frauds.*—Such promise will not make the defendants liable upon such a contract.

But

when there is *an issue as to the authority of a broker to make a binding written contract, to wit, a bought note on behalf of the promisor, and there is some evidence tending to show that the promisor knew that the broker had assumed to make such bought note on his behalf, and assented thereto, the promise is relevant testimony on the question of authority to make a bought note in conformity with the terms of the purchase. But, semble, not to include therein other terms.*

2. *Indefinite expressions in a contract.*

(a.) Where a bill is presented to a party to a contract showing a liability thereunder, which could only be arrived at by reading an indefinite expression in the contract in a particular sense, and he promises to pay, except as to a part, his non-liability for which he places on a ground growing out of and depending on that construction of the contract upon which the bill presented to him was made out, *such promise is relevant evidence* to the fact that the promisor at the time of making the contract knew what the expression referred to, and that it was used in the sense attached to it by the party making out the bill, and that he, the promisor, intended it to be used in that sense.

**V. PARTIES.**

**1. DEFENDANTS; JOINDER OF.**

(a.) When a party sells to B 1-8 and to C 1-8 of certain personal property, to arrive, B agreeing to purchase the 1-8 and C the 1-8 ; the terms of the contract being, that the property on arrival should be entirely under the control of the seller, and be sold at auction or private sale, at his option, and the profits or loss resulting from such sale should be due and payable on rendering of accounts ; and a broker acting for both purcha-

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Statement of the Case.

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sers makes a single bought note, containing above terms of purchase, *the seller may bring a separate action against each purchaser for his share of the loss. There is no such joint interest as requires their joinder as defendants.*

Before CURTIS, Ch. J., SEDGWICK and SPEIR, JJ.

*Decided May 8, 1877.*

Exceptions ordered to be heard in first instance at general term, after dismissal of complaint.

The complaint averred, that the defendants bought of the plaintiffs one-eighth undivided share of, or interest in, cargoes of fruit, on board of vessels called *Unione* and *Alaska*, then at sea, for a price agreed upon; that, at the time of the sale, it was agreed that the fruit on arrival, should be entirely under the control of the plaintiffs and be sold by them, at public auction or private sale, at their option, and one-eighth of the profits should be paid to defendants and one-eighth of the loss paid by them; that the cargoes arrived and were sold at public auction to the highest bidders; that the sale resulted in a loss, and that accounts of the same were made and presented to defendants; that one-eighth of the loss was \$1,456, which was demanded of defendants, but which they refused to pay.

Answer admitted the presentation of account stated in complaint, but otherwise denied complaint generally; and as a separate defense alleged that there was defect of parties, and that Arthur Pendleton and Charles H. Pendleton should have been made defendants.

On the trial, one Brandigee swore that he was a fruit broker; that the defendants asked him to buy an interest in the cargo of the two vessels, for them; that one Pendleton asked him to buy another interest; that he went to the plaintiffs and bargained for them, but there was no agreement, as to the price; that after-

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Statement of the Case.

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wards one of the defendants, viz: Gallagher, Pendleton, and one of the plaintiffs, viz: Giles, met Brandigee at the office of the last, and they then talked of the price and it was agreed upon. Proof was given, tending to show that Brandigee acted as broker also for the plaintiffs; they paid him a commission afterwards. There was testimony that at the last interview it was stated orally between the parties that the sale was to be on the usual terms. Without specific authority thereto, the broker, after the oral arrangement, began to write a paper. No witness made it clear that the defendants were present during the writing and signing of the paper, but the broker said they were present at the beginning of the writing. The paper was as follows:

“NEW YORK, May 18, 1874.

“Bought of Lawrence, Giles & Co.

“for Gallagher & Lane, and A. Pendleton & Son, each one-half of one-quarter interest in the cargoes of fruit, to arrive by the *Unione* and *Alaska* from *Messina*, viz:—

(2,000) Two thousand boxes lemons	} per “ <i>Unione</i> ,”
(2,000) Two thousand do. oranges	
(3,000) Three thousand do. oranges	} per “ <i>Alaska</i> ,”
(1,800) Eighteen hundred do. lemons	
at \$6.00 per box for oranges	
and \$6.25 per do. for lemons.	

“The said fruit on arrival to be entirely under the control and management of the sellers, and to be sold at auction or private sale, at their option, and the profits or loss resulting from such sales are to be due and payable on rendering of accounts.

“BRANDIGEE & THORNE,  
“Brokers.”

The cargoes arrived, were sold at public auction, under the direction of the plaintiffs. There was a loss.

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Plaintiff's points.

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Accounts of the sale were made and sent to the defendants. A bill for one-eighth of the loss was presented to the defendants, and one of them said "that he would pay all the losses for the cargo of the *Unione* and *Alaska*, with the exception of that occurring by the failure *McNeil Brothers* ; "that he would not pay that, that he would go to law first," and the same promise was made on another occasion. Proof was given tending to show, that in the fruit trade, sales of cargoes of fruit at sea, were always made to be closed and settled in the manner indicated by the paper signed by the broker.

The court dismissed the complaint, on the ground that no cause of action was shown, and the exception to this was directed to be heard in the first instance at general term ; judgment stayed.

*Nathaniel & Marston Niles*, attorneys, and *Wm. W. Niles*, of counsel, for plaintiff, urged :—I. An oral agreement is all sufficient, for it is not a sale of "any goods" but of an interest in a venture (*Coleman v. Eyre*, 47 *N. Y.* 38).

II. Even if it were not, the statute was, in this case, complied with. The memorandum needs only to be subscribed by the party to be bound (3 *R. S.* [5th Ed.] 222, § 3). It may be signed by his agent (*Id.* § 8 ; *Seabright v. Archibald*, 20 *L. J. Q. B.* 529).

III. The memorandum may be made by the agent of the party charged, and it is equally binding as if written by defendant's own hand (*Merrith v. Closson*, 12 *Johns.* 102).

IV. Where a broker has authority from both parties (as in this case), a memorandum signed in his own name, is sufficient to bind both parties (*Sale v. Daragh*, 2 *Hill*, 184). And the authority need not, in either case, be in writing (*Champlin v. Parish*, 11 *Paige*, 405 ; *Lawrence v. Taylor*, 5 *Hill*, 107).

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Defendant's points.

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*D. G. Wild*, attorney, and *Sidney S. Harris*, of counsel, for defendants, among other things urged :—I. The contract for the sale of 1-8 of the cargoes to defendants “to arrive” was executory, and as there is no evidence of delivery, or offer to deliver, no title passed to the defendants (*Shields v. Pettee*, 2 *Sandf.* 262 ; *Benedict v. Field*, 16 *N. Y.* 597 ; *Reimers v. Ridner*, 2 *Robt.* 11 ; *Parsons Mercantile Law*, p. 49) ; and there was no receipt or acceptance by defendants (*Shindler v. Houston*, 1 *Comst.* 261 ; *Rappleye v. Adee*, 65 *Barb.* 589).

II. There is no memorandum in writing of sale, signed by the defendants or their lawfully authorized agents, nor delivery of any portion of the cargoes, nor payment of any part of the purchase money, and the sale is void (2 *R. S.* p. 136, § 3). *Brandigee* had no authority from defendants to purchase the interests in the cargoes, on the terms finally agreed upon by *Giles* and *Gallagher*, and therefore had no authority to sign any contract of purchase (*Aquirre v. Allen*, 10 *Barb.* 74 ; affirmed in 3 *Selden*, 543 ; *Allen v. Aquirre*, 5 *N. Y. Leg. Obs.* 380 ; *Davis v. Shields*, 26 *Wend.* 364).

2. There was no note made by *Brandigee* and delivered to defendants ; a buyer's note was sent by *Brandigee* to the plaintiffs, but neither a seller's note or a copy of the buyer's note was ever delivered to the defendants ; the defendants are not bound by the note delivered to the plaintiffs (*Seivewright v. Archibald*, 19 *Queen's Bench*, 115 ; *Benjamin on Sales*, § 294).

(a.) Defendants did not know that such a note had been made and delivered to plaintiffs.

(b.) The notes delivered to the parties are to inform them what the broker has done for each party, and unless a note is delivered to each party, or both parties assent to one note as the written contract of the parties, there is no contract in writing binding upon the buyer (*Seivewright v. Archibald*, 17 *Queen's Bench*,

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Defendant's points.

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115; *Benjamin on Sales*, § 290, where all the English cases are discussed). The case of *Seivewright v. Archibald*, *supra*, decides that a note delivered to seller alone does not constitute a contract. There must be both sellers' and buyers' notes to bind the party to be charged.

(c.) So much of the note delivered to plaintiffs as relates to payment of any losses by defendants was inserted without authority of defendants, and the entire note is invalid (*Davis v. Sheilds*, 26 *Wend.* 341).

III. But there was no proof even that the defendants agreed to purchase 1-8 of the cargoes on the terms that plaintiffs should retain control of the cargoes, that there should be no delivery; that they would sell the cargoes at public or private sale as they deemed best, and that the profits or losses should be shared *pro rata*. The most that plaintiffs testify to is, that the sale was on the usual terms; but it is not proved that the defendants knew what such terms were, or that they understood the usual terms of sale, to be the same terms that plaintiffs testified to. The plaintiffs resorted to evidence of usage or custom, as proof of what the usual terms of sale were in such cases. This evidence is incompetent, as well as insufficient to make out a contract, for reasons stated in the next point.

IV. As to the usage relied on by the plaintiffs—(1) A usage among particular persons in the city of New York is void, not being general (*Higgins v. Moore*, 34 *N. Y.* 415; *Wadsworth v. Allcott*, 2 *Selden*, 71; *Markham v. Jaudon*, 41 *N. Y.* 245).

(2.) The usage must be known to the defendants. There is no evidence on this point (*Walls v. Bailey*, 49 *N. Y.* 477).

(3.) It must be reasonable and certain—this usage is unreasonable, as it changes the rights of the vendors and vendees.

(4.) It must not contradict or vary established rules

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Defendant's points.

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of law. The usage in question dispenses with delivery of the 1-8 of the cargoes, and is illegal (*Hone v. Mutual Ins. Co.*, 1 *Sandford*, 137; *Suydam v. Clark*, 2 *Sandford*, 133; *Beirne v. Dord*, 1 *Selden*, 102).

(6.) The usage is illegal, being in direct contravention of the statute forbidding gambling, &c. (1 *R. S.* p. 662, § 8). This usage binds parties to a speculation in the mere profits and losses on the sale of cargoes to arrive. This is a gambling contract or usage, and is unlawful (*Cassard v. Hinman*, 1 *Bosw.* 207).

(7.) The usage dispenses with the requirements of the statute of frauds, and is illegal. The usage does not require delivery of any part of the cargoes nor payment of any portion of the purchase money, and dispenses with any written memorandum as required by the statute. The usage is a repeal of the statute in this case (*Lester v. Jewett*, 12 *Barb.* 502).

(8.) The legal effect of the agreement made by the parties in this case was to sell 1-8 of the cargoes to defendants, and make delivery as required by law, and a custom to the contrary is incompetent (*Groat v. Gile*, 51 *N. Y.* 439; *Bradley v. Wheeler*, 44 *N. Y.* 500-501; *Higgins v. Moore*, 34 *N. Y.* 422-425; *Wheeler v. Newbould*, 16 *N. Y.* at pp. 401-402; *Allen v. Dykers*, 3 *Hill*, 593).

V. The complaint, if to recover 1-8 of the losses, was properly dismissed. This action cannot be turned into a suit in equity for an accounting between the parties as to the profits and losses. Such an accounting would require an examination of all the sales, the receipts therefor and expenses, and the amount due to or from each party to the other.

All part owners, whether joint owners, tenants in common, or partners in the cargoes, must be before the court, for the purpose of an accounting and settlement between all the parties interested in the cargoes (*Willard's Eq. Jur.* 104, 506; 1 *Story Eq. Jur.* § 466

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Opinion of the Court, by SEDGWICK, J.

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[§ 451]; *Story Eq. Pl.* §§ 166-168 ; 1 *Daniels Ch. Pr.* p. 277 [note]; *Donnell v. Walsh*, 6 *Bos.* 621, 626 ; *Parsons on Maritime Law*, p. 103 ; 13 *Abb.* 563). The same principle applies where several persons are affected by a common burden for the purpose of contribution (*Story Eq. Pl.* § 162).

BY THE COURT.—SEDGWICK, J.—There is no doubt that a broker, employed orally to sell or to buy, receives thereby implied authority to bind his employer, by making a written contract, of the kind designated by the employment. If the broker have received similar authority from the other party he may make the written contract for both (*Story on Agency*, §§ 28, 58, 60 ; *Smith's Merc. Law*, 3 *Am. Ed.* p. 620 ; *Hadoch v. Stow*, 40 *N. Y.* 368 ; *Bush v. Cole*, 28 *N. Y.*, 269 ; *Pringle v. Spaulding*, 53 *Barb.* 21 ; *Dyken v. Townsend*, 24 *N. Y.* 59. In *Hadoch v. Stow* Judge HUNT said that *Coleman v. Carrigues*, 18 *Barb.* 60, was not well decided).

In this case, however, the broker's power to make the written contract could not depend upon any previous employment to buy for the defendants. At the first the defendants had employed the broker to buy, at a named price. If, under that employment, he had bought at that price, he might have made a written contract on those terms. He did not buy at that price ; and to give him fresh implied authority there must be a new employment. The testimony does not show any other employment to make a contract. After the broker failed to buy he brought the parties together. They made the agreement. He was present and took part in the bargaining, but he did not make the oral contract. Even if the principals were present, it is possible that he might have received authority to conclude the contract for them, but as a fact, in this case he was not so authorized. What the parties did they did for



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Opinion of the Court, by SEDGWICK, J.

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themselves, and the presence of a broker does not delegate a power to him. If, without previous authority, he wrote in their presence a contract, it is a question of fact as to whether the parties knew what he was doing and assented to his doing it. The mere act of writing would not show the knowledge, but the jury should consider it in connection with the other facts of the case. If the parties on either side did not know what the broker was writing they were not bound by his individual and unauthorized act. They had a legal right to make a verbal agreement by which they should be only morally bound. The broker could not subject them to legal liability against their will.

If, indeed, the facts would justify the jury to think that the brokers wrote the contract with the knowledge and assent of the defendants, the same facts should be considered in determining, if it were not also to be inferred, that the broker was also to write a contract, which should bind the plaintiffs. If, by the understanding of the parties, he was to do that, then a sold note to be made by him would be the consideration intended by the parties to bind the defendants upon the bought note. For, although an oral promise to sell, invalid in law, is enough consideration to support the written promise to buy, still, if the actual consideration was meant to be a valid promise in writing, it must be proven by the writing (*Justice v. Lang*, 52 *N. Y.* 323; 42 *N. Y.* 493); and the acceptance of a contract by the seller which states that the buyer is to buy is not conclusive that the seller has promised to sell. It is only one fact to be considered. I, therefore, think that here there was a question of fact, on which the plaintiff had a right to go to the jury as to the consideration. There was no conclusive proof that there was an oral promise to sell as the consideration, but it was for the jury to pass upon the point.

Under no circumstances can a broker bind his prin-

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Opinion of the Court, by SEDGWICK, J.

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cipal, by a writing, to any other contract, than such as he was employed to make (*Bush v. Cole, supra*), or in this case any other contract than such as was orally made between the principals (*Davis v. Shields*, 26 W. 341; *Aguine v. Allen*, 10 Barb. 74; affirmed 7 N. Y. 543; *Pitts v. Beckett*, 13 M. & W. 751).

There does not seem to be a reason for applying to a sale of a cargo of fruit any other rule of law than is applied to a sale of a cargo of iron or saltpetre or grain, and an undivided interest in any of them can be bought and sold, as can the whole interest. The present contract was executory for the purchase of one-eighth of two cargoes of fruit to arrive. Upon arrival there would have been no difficulty in making the proper delivery, either by a fair division of the fruit, or, if that were impracticable, by a delivery of a bill of sale to pass the title *in præsenti* (*Story on Sales*, § 311, *et seq.*). The case is only an extreme illustration of the inconvenience of a tenancy in common of chattels. Probably it presents no new kind of hazard or doubt (*Schouler Per. Pro.* 194-203; 1 *Abb. on Ship.* 98).

On the testimony here we may suppose, that the principals made an oral contract to buy and sell the one-eighth interest, and further, as the broker haltingly said, on the usual terms, or by the usual contract. The plaintiff gave evidence to show that the practice of the trade was, that after undivided interests had been sold, of cargo to arrive, upon arrival the seller took and kept possession of it, sold it, and divided the losses or profits. I see no need of ascertaining how far usage, properly so called, considered as a fact, which entered into the contract, can define it. Here the terms of the oral contract, apart from the addition of the words "usual terms," were unambiguous, and by them the parties meant to buy and sell. Indeed, the claim of plaintiff is based upon the treating the de-

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Opinion of the Court, by SEDGWICK, J.

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fendants as the owner of one-eighth of the cargoes. The substance of the contract as plaintiffs claim was, that in the manner pointed out by the contract, the sellers as co-tenants in common were entitled to sell the whole, and to pay themselves the consideration out of the proceeds, if sufficient, and to pay over to defendants, or to charge them in the proper case, but the foundation of all was that by the agreement the defendants were to be the owners of one-eighth of the chattel. In *Coleman v. Eyre*, 45 *N. Y.* 38, the contract had no regard to the title of the coffee. It only referred to the profits and losses.

As the contract was in a certain event to clothe the defendants with the rights of owners, a usage which would annul these rights, not being part of the contract (unless adding the words on the usual terms or by the usual contract made it so), cannot vary it.

In *Wheeler v. Newbould* (16 *N. Y.* 392), the defendant was pledgee of promissory notes, without special leave to sell at private sale, and it was held that as a mere pledgee had no right by law to do this, a usage in the city, to sell such pledges at private sale, after a demand of payment and notice that it would be sold for the best price, was no part of the contract, as it was in contradiction to its fair and legal import. *Markham v. Jaudon* (41 *N. Y.* 235), is a similar case. In *Wadsworth v. Allcott* (6 *N. Y.* 71), it was held that a receipt, which by its clear terms created a bailment, could not be shown by usage to import a sale (*The Mutual Safety Ins. Co. v. Hone*, 2 *N. Y.* 235). In *Dawson v. Kittell* (4 *Hill*, 108), the term "as freight," NELSON, J., said, might be shown by usage to import a sale, but no such usage was proved. This case cannot be deemed to deny the correctness of the rule laid down in *Good-year v. Ogden* (4 *Hill*, 104), for they were decided by the same court.

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Opinion of the Court, by SEDGWICK, J.

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The usage in this case would have materially changed the rights of defendants as owners. Their right to an undivided eighth of the fruit, and their right to take possession of it, in cases provided by law, would be changed to giving the plaintiffs an exclusive right to retain the custody of the whole in all cases.

We must now consider what was the effect upon the contract of adding the words "*on the usual terms,*" or "*by the usual contract.*" The proper application of these words is not clear and certain. They might be used to refer only to a simple contract of sale, and to mean that the terms on which payment and delivery were to be made, were to be the usual terms. They might, also, in view of surrounding circumstances, without violence, mean that the interests of the co-owners should be settled as they were usually in the trade. In what sense they were used or assented to by the defendants was a question of fact for the jury. If in the former, the usage could not vary the contract to deliver and pay, so as to make it a contract under which there was to be no delivery and payment. To permit the jury to find that the words were used in the latter sense, they must first have proof before them that the defendants knew what the practice was and meant to refer to it by the general words. In the absence of such knowledge there would not be enough to justify the jury in saying that a contract of sale, clearly expressed, was meant to be turned into something else by adding, on the usual terms. If by usual terms, the defendants referred to the practice of which they had knowledge, it is not necessary that the practice should amount to a legal custom or usage (*Remsen v. Holland*, 59 N. Y. 618). Even if the defendants did have knowledge of the practice, they might have meant simply to purchase, and whether they did so mean was for the jury to say.

I think there was enough to take the case to the

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Opinion of the Court, by SEDGWICK, J.

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jury on the point of the authority of the broker, to make the writing in behalf of the defendants, of the consideration, and of what the oral contract actually was. On all these points, a subsequent promise of the defendants was relevant testimony. After the sale of the cargoes by the plaintiffs, they presented to the defendants a bill charging them with the one-eighth of the loss. The defendants promised to pay it, excepting such part of the loss as came from a sale of part of the cargo to a person alleged not to be of good credit. This promise was evidence of what the parties had theretofore agreed upon. It would not make the defendants liable if the agreement referred to by it was void under the statute of frauds, but it would be of some weight to show that the terms of the oral agreement had referred to the practice of the trade. If it were shown that the defendants knew that the broker had written for them a contract, the promise would ratify his act (*Commercial Bank v. Warren*, 15 *N. Y.* 577), and bind them by the terms of it, but only if before the promise it was shown that the defendants knew that the particular terms referred to the practice (*Baldwin v. Burow*, 47 *N. Y.* 199).

As to this, the character of the promise was evidence, upon proof that defendants knew that there was a written contract made for them.

I am therefore of the further opinion that the plaintiffs had a right to go to the jury upon the question of ratification. This would not dispense with proof of due consideration.

If the contract between the parties were the writing signed by Brandigee, it could be enforced in an action against the defendant alone. I do not see any joint interest which required the presence of other defendants as co-owners. If they were joined, the issues would be several between them.

Opinion of the Court, by SEDGWICK, J.

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On the whole case, I think the exceptions should be sustained and a new trial had, with costs to plaintiffs to abide event.

CURTIS, Ch. J., and SPEIR, J., concurred.

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Statement of the Case.

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THE PEOPLE OF THE STATE OF NEW YORK,  
PLAINTIFF AND RESPONDENT, v. LUCINDA N.  
STARKWEATHER, DEFENDANT AND APPEL-  
LANT.

## I. MUNICIPAL LAW.

## 1. CITY OF NEW YORK.

## (a.) COLLECTOR OF ASSESSMENTS.

1. *Charges of collection. On what he cannot charge.*

1. Under section 150, article 13 of Ordinances of 1859, giving him commission on assessments paid and on certain unpaid assessments, he can make no charge in respect of ASSESSMENTS ASSESSED ON THE CITY.

(a.) *He cannot* either personally or by virtue of his office *do anything beneficial* to the city in respect of such assessments.

(b.) *The including* under the ordinance of July 18, 1853, *in the assessment list*, commissions on the amount of the assessment upon the city at the rate fixed by section 150, article 13 of the Ordinance of 1859, does not entitle the collector to receive them.

(c.) *Commissioners of estimate and assessment.* Confirmation of reports of, is not an adjudication that the sum contained therein for the expenses of collection is due or payable to the collector. See RES ADJUDICATA, *post*.

(d.) *Tax levies.* An act authorizing the city to raise funds to pay assessments charged to or assessed upon the city, in which is included a percentage for the collection thereof, gives the collector no right to the percentage.

(e.) *Voluntary payment.* A payment by the officers or agents of the city to the collector, not authorized by said ordinance of 1859, *does not fall within the principle which prevents the recovery of money voluntarily paid.*

See PAYMENT, *post*.

## II. RES ADJUDICATA—WHAT IS NOT.

## 1. REPORTS OF COMMISSIONERS OF ESTIMATE AND ASSESSMENT, CONFIRMATION OF BY THE COURT.

## (a.) COLLECTOR OF ASSESSMENTS, EFFECT AS TO.

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Statement of the Case.

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1. Although the reports so confirmed contain a percentage on the amount assessed to the city for the collection thereof, the confirmation thereof *is not an adjudication that such percentage is due or payable to the collector.*

1. IN REM. As an adjudication *in rem* it only adjudges that the percentage is a proper provision to indemnify the city against future contingencies, and is a provision for the benefit and use of the city only.

2. IN PERSONAM. The collector not being a party nor in privity with a party, cannot take advantage of the adjudication.

(a.) *If in privity*, he was so only through his contract with the city, and the judgment could not, as between him and the city, enlarge his rights beyond those given by the contract.

### III. PAYMENT.

#### 1. VOLUNTARY.

(a.) The doctrine that money so paid (there being no mistake of fact or fraud) cannot be recovered back *does not apply where money is paid by an officer or agent of a municipal corporation without authority.*

### IV. LIMITATIONS—STATUTE OF.

#### 1. REVIVING CAUSE OF ACTION BARRED, POWER OF LEGISLATURE.

(a.) The legislature has power to give by statute, a remedy by action for a cause that has been barred by an existing statute.

#### 2. ACT OF 1875, CHAP. 49 (CALLED PECULATION ACT).

(a.) CAUSE OF ACTION. This phrase used in the act refers not to the cause of action the city had before the act, but to that given to the People by the act.

(b.) PAST RECEIPT OF MONEY. The cause of action given for the recovery thereof to the People accrued immediately after or upon the passage of the act.

### V. ACT OF 1875, CHAP. 49.

#### 1. EFFECT AS AFFECTING COUNTER-CLAIMS AND SET-OFFS.

(a.) COUNTER-CLAIMS. No claim not affecting the People can be counter-claimed.

*Consequently a claim against the city cannot be.*

(b.) SET-OFF.

1. Nor can any matter be considered as a set-off against the recovery of money for the recovery whereof the act gives a right of action to the People.



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Statement of the Case.

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Before CURTIS, Ch. J., SEDGWICK and SPEIR, JJ.

*Decided May 8, 1877.*

This is an appeal by the defendant from a judgment rendered at a trial term in an action tried by the judge alone without a jury.

The action was originally against Henry Starkweather, who died after issue joined and before trial. The suit was revived against his administratrix with the will annexed, on November 23, 1875.

The action was brought under the statute of 1875, ch. 49, in the name of the People, to recover from Henry Starkweather, who had been collector of assessments in the city of New York, certain moneys alleged to have been paid to him as such collector in excess of his legal fees. The mayor, aldermen and commonalty of the city of New York, under whom he held the office, were also impleaded as defendants, but took no part in the litigation.

The defendant, Starkweather, held office as collector of assessments from January 1, 1868, to May 1, 1872. When he was appointed, the compensation of the collector was not a salary, but a commission, on the assessment, established by ordinance (§ 150, art. 13, *Ordinance* 1859). The ordinance was amended in 1858 so as to provide that no moneys should be retained out of the assessments collected, which were to be paid over in gross, but that the collector and deputy collectors should each receive an equal part of two and one-half per cent. on all assessments collected, and of two per cent. on all unpaid items returned to the bureau of arrears, for which two personal demands for payment had been made, such fees to be paid monthly on the requisition of the street commissioner, &c.

The commissions for which this action was brought were paid upon bills duly rendered, and upon the requisition of the proper officers.

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The ground of plaintiff's claim is, that the fees sued for were received without right, and that they were computed upon that portion of "the total amount" of the assessment which the reports, in the several cases of street openings in which the question was involved, charged upon the mayor, aldermen and commonalty.

Defendant, besides claiming that these charges were "items of assessment" within the meaning of the ordinance, raised the following points of defense:

*First.* That these collectors' fees were inserted in the reports of the commissioners of estimate and assessment in the street-opening proceedings, as a charge upon the lands benefited, and had been thus collected from the property, and that the reports having been confirmed by the court, there had been a *quasi* judicial adjudication of the question.

*Second.* That by the operation of certain acts known as tax levies the collector was entitled to retain the fees claimed.

*Third.* That as to a part of the plaintiff's claim, it was barred by the six years statute of limitation.

*Fourth.* By way of counter-claim or set-off it was set up that the city was still indebted to Starkweather and his deputy in certain amount for fees on collections.

The counter-claim or set-off was overruled, and judgment given for the plaintiff for \$192,097.66.

The defendant Starkweather appealed to the general term.

*Nash & Holt*, attorneys, and *S. P. Nash*, of counsel, for appellant.\*

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\* NOTE.—The points of the respective counsel are too long to report in full, and too elaborate to epitomize with justice to them. They can be found in the volumes of cases kept in the judge's room, or in the library of the Bar Association.

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Opinion of the Court, by SEDGWICK, J.

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*Chas. S. Fairchild*, attorney-general, attorney, and of counsel, and *Francis C. Barlow*, of counsel, for respondents.

BY THE COURT.—SEDGWICK, J.—Section 150 of art. 13 of the revised ordinances of 1859 specified the compensation to be paid to the collector and his deputies. They were to receive each as compensation for their services an equal part of  $2\frac{1}{2}$  per cent. on all items of assessments collected by the bureau during their terms of office, and of 2 per cent. on all unpaid items of assessment returned during their term of office to the bureau of arrears for which two personal demands have been made by the collector or deputy collector on the persons required by law to pay the same; no moneys, however, collected on any assessment, shall be retained on account of such fees or compensation, but the amount of fees thereon shall be paid monthly on the requisition of the street commissioner, to the extent of any moneys which may have been collected and paid into the city treasury upon such assessments, &c.

The percentages involved in this action were not upon any moneys which required collection for the city, or payment to it, or indeed, which could be collected by, or paid over by the collector. These were in fact, so far as they were items of assessment, mere charges against the city, of a proportion of the sum found in the assessment proceedings necessary to be paid to persons whose property was taken, with expenses. Before the statutes that directed that the city or county should pay a proportion of this sum, say one-half, this sum was (excepting a small portion of it assessed against the city, on pieces of land it might happen to own, or for one-third of the value of buildings), charged to a variety of persons whose land was benefited by the improvement, and these charges were the items of assessments alluded to in the ordinance for

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the collection of assessments. These items were owed by third parties, and could be collected and paid over to the city. By virtue of the statutes referred to, after their passage, one-half of the compensation to persons whose property was taken, and of the expenses, or one-half of the items referred to, were charged to the city. As to the half, in the nature of things, it could not be collected. Calling it an assessment does not change its nature. It was but a charge. It was an assessment, because the commissioners had to assess or fix the amount of the charge. On the commissioners fixing it and charging it, the collector could do nothing by virtue of his office or personally that would put the city in possession of the amount of the charge. By law and the practice of the corporation, the city would be reimbursed, for its expending the amount, by the collection of the taxes.

This assessment or charge against the city had no characteristic in common with the sums described in the ordinance, on which there was to be a percentage calculated to ascertain the amount of compensation. It could not be collected at all, and particularly not in the sense in which items of assessment against private owners could be collected. It could not be considered as paid to the city, through the agency of the office, for at no stage after it was imposed was its status changed, virtually or substantially, as to the proceedings for the collection of assessments. It was not a collected or paid assessment as contrasted with the unpaid assessment, on which two per cent. was to be calculated, and it never was an unpaid assessment. The compensation for collected assessments was to be calculated upon sums actually paid into the city treasury by the collector. The apparent meaning would not give a percentage on the amount of the charge to the city.

But it is argued that section 150 did not repeal an

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Defendant's points.

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ordinance of July 18, 1853, which provided that the assessors shall, in every assessment list, include an amount equal to two and one half per cent. upon the total amount of such assessment, as compensation to the collector and deputy collector of assessments, and that this implied that they were to get a percentage upon the total amount. Perhaps this ordinance might give rise to a tacit understanding, that such was to be the compensation; but this tacit implication had no existence after there was an express arrangement between the parties, as stated in section 150. That limited the fees, and provided that in certain contingencies the collector was not to have a percentage on the total amount of the assessment. He was not to have fees upon assessments that he did not collect, or upon such as were not twice demanded by him; and the direction to assessors became solely one to indemnify the city with certainty against fees it might have to pay; and at that time, as comparatively inconsiderable portions of the assessments were paid by the city, the fees would in fact turn out to be, if the collector and deputies performed their duty zealously, about two and one-half per cent. upon the total amount. But it might be, if the collector was not zealous that he would collect and demand nothing from the parties, from whom the city needed the money, and would have no fees as to them. In such case, if the appellant's position is correct, he would be entitled to a percentage upon amounts assessed to the city, and as to which the collector could not benefit it.

Certainly, the city would not be justified in intentionally getting money to be paid as fees, which were not meant to be so paid it. Doing so, however, could not increase the amount of fees to be properly paid, and an intention to devote the money wholly to fees would not show that it did so in fact, in face of the ordinance that made a different provision.

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Defendant's points.

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I do not see that the result would be affected, by deeming that the collector was not bound, in order to earn compensation, to go through the mere form of taking a check from the city authorities and returning it, or if they refused to give the check, making two demands for the money. The question would be at all stages, did he collect, in the sense of the ordinance? or did he make the demands meant by it? If he could do nothing in respect of the money which would assist the city in going into beneficial possession of it, it cannot be said that it was collected by him, or that it was an unpaid assessment returned to the bureau of arrears.

It is further argued that the confirmation of the commissioner's reports became an adjudication that commissions upon the total amount should be paid as compensation to the collector. There is no doubt that the confirmation is a final adjudication, as to all matters then judicially determined; but there will be no estoppel as to what was not determined, although it may have been incidentally or collaterally presented to the court. The point of importance is that there was a judicial confirmation of the report, which states among other things that the commissioners have charged as part of expenses of the improvement certain sums, being the amount of fees for the collection of said assessments. Manifestly it was intended that the city should be paid these sums, through the subsequent proceedings after the report. They were not paid as fees, for the fees were to be earned upon the collection of the assessments. The court could not have said in the proceeding that any part of them belonged to the collector, for there was no issue as to that. It only said that the sum was a proper provision for future contingencies. As to that, there was a final adjudication. Undoubtedly the court had proven or mentioned before it some standard by which to fix the

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amount of the indemnity, but this standard was only a piece of evidence. It was but incidental and collateral to the adjudication, and therefore not a subject of estoppel. What this standard was is not in proof here. It is not inconsistent with the proceeding that it was contemplated only to make the city safe, beyond hazard, and that specific calculations were not relied on. Under all circumstances, it was meant that the city, alone, should have the benefit and use of the sums, and this is the full effect of the adjudication *in rem*.

If relied upon, as an adjudication *inter partes*, the collector was not a party to it, not bound by it, and therefore, cannot take advantage of it. Whatever was the character of the proceeding, the collector could have recovered from the city the amounts due by the ordinance.

The collector, not being a party, could take advantage of the adjudication only as being in privity with the city. He was not, in fact, in privity, because the city was under no obligation to him, or he to it, to have a sum fixed, out of which to pay fees. The supposed privity could only be based upon the contract between them as contained in the ordinance, and his rights under the judgment as a privy thereto could not be enlarged beyond his rights as between himself and the party.

The distinction between *Pitman v. The Mayor* (3 *Hun*, 370) and this case, is marked. In the cited cases, the commissioners were parties to the proceeding, adversary, so far as their charges were concerned, to the city and the other parties. Their rights, *in presenti*, were demanded, contested or capable of being contested and passed upon in taxation and subsequent confirmation, as fully as they could be in an action. Here there was no right of the collector's demanded.

The fact may be that the city should not have accepted so large a sum for expenses, but it was given to it for its own benefit. The legal rights of the



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collector are not increased thereby, and morally the amount overcharged should be returned to the parties from whom it was taken (*Atlantic Dock Co. v. The Mayor, &c.*, 53 *N. Y.* 64).

In my view of the case, these reports cannot be used to modify the unambiguous words of the ordinance. The intent in fact was to refer, so far as they were represented to the court, to an existing contract, which by its terms fixed the fees. It cannot be thought that the reports were meant to be a means of increasing the fees. Moreover, the defendant was not a party to the proceeding, and the contract was not changed by agreement.

I cannot see that the tax levies (2 *Laws of* 1868, 2020 and 2 *Laws of* 1869, 2123) meant to change or to construe the ordinance. They empowered the city to receive funds to pay the assessments and amount charged to it, in certain improvements, as set forth in the reports of the commissioners, and to pay expenses and assessments already imposed, and amounts charged to or assessed upon the city. These acts do not go farther than enabling the city to pay what it was bound to pay, but did not pass upon what its obligations were, unless (as is claimed) by its reference to the reports as confirmed. At the most, this would be an unnecessary ratification of the reports, and gave no rights beyond the legal effect of the reports, as they have been already considered here. Whatever was to be paid to the collector was by force, not of the reports, but of the ordinance.

As to the position that the moneys paid cannot be recovered, as they were voluntarily paid upon claims against the city, competently audited by officers having authority to settle and pay, I think that the cases of *Board of Supervisors v. Ellis*, 59 *N. Y.* 620, and *People v. Fields*, 58 *Id.* 491, show that it is not well taken.

It is urged that the first cause of action is barred by



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the statute of limitations, because, before the act of 1875 was passed, this cause of action had been barred by the statute of limitations then applicable to it. It is not claimed that the legislature has not power to give, by a statute, a remedy by action for a cause that has been barred once. The intent of the act of 1875, to give the people an action for moneys received before the passage of the act, is clear, and for such action, the time of limitation was given in the act. The words "after the cause of action shall accrue" referred, not to the cause of action that the city had before the act, but to that given to the people in the act. As to past receiving of money, this cause of action accrued immediately after or upon the passage of the act, and the use of the term, "shall accrue," was accurate as to chronology, because the words of the act must be devised and used for it before it takes effect as law.

The matters set up as a counter-claim cannot be maintained as such, because they do not charge any debt upon the plaintiff. Nor can they be considered as matter of set-off, because the act of 1875 vests the money for which the defendant is responsible and the title to it in the State, and this right cannot be diminished for any purpose. The act had a policy of its own, and intended to confine the issues to be tried in the actions to be brought under it, to the circumstances attending the alleged unlawful taking of money.

The judgment should be affirmed with costs.

CURTIS, Ch. J., and SPEIR, J., concurred.

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Statement of the Case.

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WILLIAM DEMUTH, PLAINTIFF AND APPELLANT,  
v. THE AMERICAN INSTITUTE OF THE CITY  
OF NEW YORK, DEFENDANT AND RESPONDENT.

I. CONTRACT.

1. PROSPECTUS CALLING FOR APPLICATIONS, AND APPLICATIONS  
MADE PURSUANT THERETO, WHEN THEY DO NOT CONSTITUTE A  
CONTRACT.

(a.) When the prospectus, and the blank form of application accompanying it contain no promise to grant that which should be applied for; *a fortiori*, where the nature of the prospectus and blank application is such as to inform the party applicant that the party issuing the prospectus reserves the right to exercise his discretion and judgment as to whether the application should be granted or not.

1. This although the *party applicant may have gone to expense* in and about the carrying into effect his application.

II. APPLICATION OF PRINCIPLE.

1. AMERICAN INSTITUTE OF THE CITY OF NEW YORK.

(a.) This institute, being about to hold a public exhibition, issued a prospectus calling the attention of inventors and manufacturers to it, and setting forth the manifold benefits to be gained by them by a public exhibition of their wares at said exhibition, and distributed the same with a blank form of application for "an allotment of space at the exhibition." This blank form had among other things the following printed on it: "Space. The managers do not agree to allot any special amount of room until the articles for which space has been desired are within the building." Two of these prospectuses and accompanying forms of applications were received by plaintiff, who properly filled out the blanks specifying the amount of space required, signed them and sent them to the defendant with the required entrance fee, and in all other respects complied with the conditions printed on the application forms. Before the opening of the fair, plaintiff sent the wares specified in his application to defendant's rooms, but defendant refused to receive them for exhibition. After this, defendant sent to plaintiff, by mail, a check for the amount of

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Statement of the Case.

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entrance fee paid by plaintiff, but plaintiff returned the check. The plaintiff incurred expenses in making certain wares attractive and fit for exhibition. There were empty spaces in the exhibition room in which plaintiff's wares might have been placed:

HELD,

that plaintiff had no cause of action against defendant for its refusal to receive his goods for exhibition.

Before SEDGWICK and SPEIR, JJ.

*Decided May 8, 1877.*

Appeal by plaintiff from judgment entered on dismissal of complaint.

The complaint averred that the defendant, for the purpose of inducing the plaintiff and others to exhibit their wares at an exhibition about to be opened by the defendant, issued a prospectus, wherein the attention of inventors and manufacturers was called thereto, and the manifold benefits to be gained by them, by a public exhibition of their wares at said exhibition, were set forth; that, induced by said prospectus, the plaintiff signed an application, the form of which had been sent by the defendant to the plaintiff; and that, pursuant to said application, the defendants entered into a contract with plaintiff, whereby for the sum of \$14, then paid by plaintiff to defendant, the defendant agreed to allow plaintiff to exhibit certain described wares at the exhibition of the defendants, to be held, and also agreed to furnish plaintiff a certain portion of space for the exhibition of his wares, and to furnish tables on which to place his show cases, and to give plaintiff an exhibition ticket; that the plaintiff prepared certain of his wares for the exhibition, in accordance with his application, at great cost, and duly offered them to defendant for exhibition, but the defendant, rejected and refused to receive the same, to the great damage, &c.

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The answer contained a denial of the material allegations of the complaint.

On the trial, it was shown that the plaintiff received the prospectus specified in the complaint, which for the purposes of the trial seems to have been admitted to have been issued by the defendants.

The plaintiff thereupon sent to the defendant an application (or two, the evidence does not distinctly show which) filled up and signed by him, stating particulars, most of which are unimportant to this appeal. The space asked for was about thirty feet by six feet. The application was accompanied by the check of plaintiff for \$14. The defendant received both.

The form of the application was as follows :

To the Managers of the 43rd National Exhibition of the American Institute, 1874.

Application is hereby made for an allotment of space at the Exhibition for the following

<i>Name of Article,</i>	-	-	-	-
-	-	-	-	-
<i>Its actual dimensions,</i>	-	-	-	-
<i>Floor space desired,</i>	-	-	-	-
<i>Table space desired,</i>	-	-	-	-
<i>Wall space desired,</i>	-	-	-	-
<i>Power required for Machine in motion,</i>				
<i>Name in full of its Inventor,</i>	-	-		
<i>Residence of Inventor,</i>	-	-	-	-
-	-	-	-	-
<i>Name in full of its Manufacturer,</i>				-
<i>Place of Business of its Manufacturer,</i>				
-	-	-	-	-
<i>Name in full of its Exhibitor,</i>	-	-		
<i>Place of Business of Exhibitor,</i>	-			
-	-	-	-	-

SPACE.—The Managers do not agree to allot any special amount of room until the articles for which space has been desired are “within the building.”

CHANGE IN LOCATION AND SPACE GRANTED.—Changes as to position and space granted will be made as often as may be required to properly group and classify the goods, or for the better apportionment of space; which change shall be entirely within the duties and power of the General Superintendent.

SIGNS.—Signs will not be allowed of greater size than 300 superficial inches, nor shall such signs be elevated above the goods.

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The above described has      been before exhibited.

I hereby apply for above, as specified, subject to the rules and conditions on the other side of this application, all of which I accept.

[Signed]

 The applicant will please fill up the above blanks, and forward to "GENERAL SUPERINTENDENT, American Institute, New York."

CONDITIONS UPON WHICH THIS APPLICATION IS EFFECTED.

[Here follow conditions which need not be set out.]

The plaintiff thereupon went to expense, that would not have been incurred by him, in the usual management of his business, to make certain wares attractive and fit for exhibition. About, but before the opening of the fair, he sent these wares to the rooms of the defendants, but they refused to receive them for exhibition. A clerk of theirs gave as a reason that there was no room for them. After the fair opened, it was proved that there were empty spaces in the exhibition rooms in which plaintiffs wares might have been placed. The defendants sent to plaintiff a check for \$14, but it was returned to defendants.

The plaintiff offered testimony as to damage. It is unnecessary to state the particular offers, for at the end of the case the judge dismissed the complaint, deciding that there was no contract, on which defendants were liable. Exception was taken.

Judgment was entered on the dismissal, and this appeal is from that judgment.

*Sigismund Kaufmann*, attorney, and *Lewis B. Sanders*, of counsel, for appellant.

*Alfred T. Ackert*, attorney, and *Malcolm Campbell*, of counsel, for respondent.

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Opinion of the Court, by SEDGWICK, J.

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BY THE COURT.—SEDGWICK, J.—The plaintiff cannot recover, without showing that the defendants agreed to give him some space in their exhibition rooms, wherein to show his wares. There must be proof as to the quantity of space agreed upon. The size of the space is an essential term of the contract, and if there were no common assent to that, there is in fact no contract, or it may be said, that if it be conceded there was a contract, its uncertainty as to what the defendants were to give the plaintiff, makes it incapable of enforcement (*Brown v. N. Y. Central R. R.*, 44 *N. Y.* 79; *Foot v. Webb*, 59 *Barb.* 39; 2 *Parsons on Contracts*, 5th ed. note *e* to p. 557).

In the view we take of the case, it is unnecessary to look generally for a consideration, or to inquire in particular whether there was any implied request that the plaintiff should fit his wares for exhibition, the defendant promising that if he did so, space would be given, unless the articles offered were not suitable for a fair of the kind. There certainly was no independent request that the defendant should go to expense.

The prospectus of the defendant, inclosing, it is probable, the blanks for applications to be filled in and signed by manufacturers and others, did not promise to give the spaces to be specified by the applicants. There was no proof that after the plaintiff's application was sent in, the defendant ever did or said anything which was a promise to give the space the plaintiff stated in the application that he called for. On the contrary, there was, on the plaintiff's construction of the evidence, a refusal to give any space. On the margin of the blank which was filled up, the following was printed: "Space. The managers do not agree to allot any special amount of room, until the articles for which space has been desired, are within the building." That meant no more than that there was no particular quantity of space agreed upon then,

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or to be agreed upon at all, until the articles were within the building. If this was an agreement at all, it was, in the language quoted by *Brown v. New York Central R. R. Co.* "an agreement to enter into an agreement upon terms to be afterwards settled between the parties," and this was said to be a contradiction in terms.

This statement upon the blank was a notice, that in the discretion of the managers, a part of the articles might not go into the exhibition, and that the space allotted might be so small that the applicant would not wish to exhibit anything, and the applicant could not have thought that the defendant requested him to go to expense, on its account, in such a contingency.

It is clear that the making of the agreement, as to space, was to be postponed until a future time, and the proof shows that no agreement was made in the future. There being no agreement, the plaintiff cannot recover damages for being excluded from a space to occupy which he shows no right.

Still further, the plaintiff knew from the terms and conditions printed on the application that the defendant entertained the purpose of admitting articles after the fair was opened, on payment of a certain fee. In the nature of things, as plaintiff knew, the applications for space, before the opening of the fair, might call for a greater area than the defendant's rooms furnished. At least, the plaintiff's right, if he had any, was not superior to the defendant's right to regard all these things, and the exercise of discretion and judgment as to them by defendant was contemplated by the circumstances of the case. Therefore, the mere fact that after the fair was opened, there was empty space, in which the plaintiff's articles might have been placed, did not show that the defendant did not give to the plaintiff, all that was held out as an inducement to make an ap-

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plication, namely the exercise of the best judgment of the defendant under the circumstances of the case.

The judgment appealed from should be affirmed, with costs.

SPEIR, J., concurred.

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ANNA H. BUTLER, PLAINTIFF, v. THE AMERICAN POPULAR LIFE INSURANCE COMPANY, DEFENDANT.

I. *INSURANCE.*

1. PREMIUMS, PAYMENT OF.

1. CHARGING TO THE ACCOUNT OF THE ASSURED OPERATES AS PAYMENT, WHEN.

(a.) When mutual accounts are kept between the insurance company and the insured (the business being transacted between the acting officers of the company and the insured), the charging the premium to the account of the insured is equivalent to payment.

1. *Mutual accounts kept; what evidence sufficient to establish.*

2. WAIVER OF NON-PAYMENT.

(a.) *Effect of receipt of subsequent premiums.*

1. Where the assured makes a payment specifically appropriating it to the payment of the premium falling due on a certain day, and the company accepts the same; such payment and acceptance *continues the policy in force*, notwithstanding default in the payment of premiums which had previously fallen due.

2. CANCELLATION OF POLICY.

1. Cancellation and practice of company as to actual entry thereof.

(a.) *PROOF OF, WHEN INADMISSIBLE.*

It not appearing that the assured had any knowledge or intimation of the cancellation; and the facts proved showing



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that there could be no valid cancellation; evidence as to the fact of cancellation and the practice of the company in relation thereto is inadmissible.

II. *FRAUD.*

1. QUESTIONS AS TO, WHEN PROPERLY WITHHELD FROM THE JURY.

(a.) When the alleged fraud was merely a mistake from which no injury resulted, and the party who it is claimed committed the fraud, immediately on discovering the mistake called the other party's attention to it, and the defendant, who is the one desiring the question to go to the jury, makes no allegation in his answer that there was any fraud in the bill (in respect whereof fraud is alleged at the trial), at the time of the settlement thereof, though the facts must then have been well known, the question as to fraud is properly withheld from the jury.

Before CURTIS, Ch. J., and SPEIR, J.

*Decided May 8, 1877.*

Exceptions ordered to be heard at general term.

The action was brought to recover \$2,000 and interest upon a policy of insurance issued upon the life of Dr. Samuel H. Butler, the husband of the plaintiff, for her benefit, on July 18, 1870.

At the date of the policy Dr. Butler had been a physician residing and practicing in Philadelphia, and the editor, proprietor, and publisher of a periodical known as the *Medical and Surgical Reporter*, and had inserted advertisements and made medical examinations for the defendant prior to the date of the policy, and published editorials in its favor.

It was agreed between the parties that the defendant should issue two policies of insurance upon Dr. Butler's life for \$2,000 and \$3,000; that the premiums upon the \$2,000 policy—the one in suit—should be paid in cash at the end of the year, with intimations that the de-

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Plaintiff's points.

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defendant would need Dr. Butler's services as medical examiner, and that he might pay the premiums on the \$3,000 policy in that way. Both policies were sent to Dr. Butler, countersigned and in force, and his promissory note for \$57.14, due July 18, 1871, was taken for the premiums upon the \$2,000 for the first year, and his due-bill for \$80.37, payable in advertising, was taken for the premiums for the same period upon the \$3,000 policy.

Dr. Butler inserted advertisements for defendant for the first year on both policies, and sent in a bill for \$135, being \$2.51 less than the aggregate of the premiums, and on September 28, 1871, defendant returned the note and due-bill to Dr. Butler, and charged the balance of \$2.51 in its favor against him in the second year. At the same time defendant sent to him renewal receipts for the second year of both policies, and wrote to him that the premiums, amounting to \$130, were charged to him. Dr. Butler inserted advertisements for the defendant during the second insurance year; and in July, 1872, he sent to defendant his check for \$66.15, payable to defendant or order, being the semi-annual premiums on the two policies for the first half of the third year. This check was received with the notices prior to July 18, 1872, and collected by the defendant, who applied it upon a balance they claimed to be due on his account for the second insurance year. The premiums were duly tendered to defendant for the second half of the third insurance year, and for the first half of the fourth year, during which last named period Dr. Butler died.

A verdict was rendered for the plaintiff by direction of the court for \$2,124.16, with directions that the exceptions should be heard in the first instance at general term.

*P. H. Vernon*, attorney, and of counsel, for plain-

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Plaintiff's points.

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tiff, among other things, urged:—I. The right and power of insurers to make agreements changing the terms and conditions of their policies, or waiving compliance therewith, have been fully established by a long line of decisions, and “is not a disputable proposition” (Trustees of First Bap. Church v. Brooklyn Fire Ins. Co., 19 *N. Y.* 305; Boehen v. Williamsburgh City Fire Ins. Co., 35 *Id.* 131; Bodine v. Exchange F. Ins. Co., 51 *Id.* 117–122; Kolgers v. Guardian Life Ins. Co., 10 *Abb. Pr. [N. S.]* 176; O'Reilly v. Guardian M. Life Ins. Co., 1 *Hun*, 460; Heaton v. Manhattan F. Ins. Co., 7 *R. I.* 502; Sheldon v. Conn. Mut. Life Ins. Co., 25 *Conn.* 207–218).

II. “Fraud is not to be inferred, but must be proved, and will not be allowed to be made out from mere conjecture, or loose inference from ambiguous and inconclusive circumstances, which are as consistent with honesty as with falsehood” (Sullivan v. Warren, 23 *How. Pr.* 188–192; Henry v. Henry, 8 *Barb.* 588).

III. There is no allegation of fraud or unfair dealings contained in defendant's answer, and no issue involving fraud exists in the case. Fraud must be pleaded (Faure v. Martin, 7 *N. Y.* 210).

IV. The defendant having charged the second year's premiums to Dr. Butler, and notified him thereof, and sent him a renewal receipt, and he having acquiesced in the charge, and retained the renewal receipt, Dr. Butler became liable to pay such premium, and the policy was continued in force, and even if the premiums were never actually paid by advertising, or otherwise, the defendant could not forfeit the policy, but has only a claim for the amount unpaid against Dr. Butler's estate (Sheldon v. Atlantic F. & M. Ins. Co., 26 *N. Y.* 461–466; Miller v. Brooklyn Life Ins. Co., 12 *Wall.* 285; Mutual Benefit Life Ins. Co. v. French, 2 *Cin. Superior Ct.* 321).

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Plaintiff's points.

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V. Where mutual accounts are kept, charging a premium to the account of the insured is equivalent to payment (*Marsh v. Northwestern N. Ins. Co.*, 3 *Biss.* 351; *Prince of Wales L. & E. A. Co. v. Harding*, *El. & B.* 183, 211, 223).

VI. The check for \$66.15, sent by Dr. Butler on July 12, 1872, and accepted and collected by defendant, paid the first semi-annual premium for the third year of the policy; and such acceptance and collection waived any previous default, and continued the policy in force to January 18, 1873 (*Carroll v. Charter Oak Ins. Co.*, 38 *Barb.* 402; 2 *Am. Leading Cases*, 625; *Frost v. Saratoga M. Ins. Co.*, 5 *Den.* 154; *Viall v. Genesee M. Ins. Co.*, 19 *Barb.* 440; *Bovier v. Connecticut Life Ins. Co.*, 23 *Conn.* 244).

VII. The defendant had no right to apply Dr. Butler's check to any purpose except that for which it was sent; but if unwilling to accept it for such purpose should have returned it at once.

"The rule is that the party paying has power to make the application at the time of payment, which he may do, either by express words, or a conduct indicative of his intention" (*Smith's Mer. Law*, 8 *Eng. Ed.* 538; *Simson v. Ingham*, 2 *B. & C.* 65; *Stone v. Seymour*, 15 *Wend.* 19, 23; *Patty v. Milne*, 16 *Id.* 557; affirmed, 22 *Id.* 558; *Hall v. Montrose*, 2 *Hall*, 185).

VIII. But even if defendant had a right to divert the check sent to pay the premium for the first half of the third insurance year, the check was effective as a tender of that premium, and its application upon the account for the second year, admitted that the policy was in force during that year (for if not in force, there was nothing due for premiums), and was a continuing waiver of any existing default (*Washoe Tool Manufacturing Co. v. Hibernia Fire Ins. Co. of Ohio*, 14 *Supreme Ct.* 75; affirmed by court of appeals, *N. Y. Weekly Dig.* vol. 3, p. 3).

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Plaintiff's points.

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This case decides that a waiver for an indefinite time cannot be terminated even by unheeded demands for payment, but only by notice that unless payment is made at a given time the policy will be void or canceled; and no such notice was given in the case of the Butler policy.

IX. Forfeitures are not favored, but are odious in law.

"Forfeitures are only enforced where it is clearly shown that they were meant by the actual agreement of the parties" (*Worden v. Guardian Mut. Life Ins. Co.*, 39 *Superior Ct.* 317-328, opinion by CURTIS, J.).

"Forfeitures are not favored, especially where delay can be compensated for in money" (*Mut. Benefit Life Ins. Co. v. French*, 2 *Cin. Superior Ct.* 327).

"Forfeitures are enforced only where there is the clearest evidence that that was meant by the stipulation of the parties" (*Helme v. Philadelphia Life Ins. Co.*, 61 *Pa. St.* 107).

X. A clause in a policy of insurance, forfeiting the same for the non-payment of premiums, refers only to premiums becoming due at the times stated in the policy, and, if different times of payment are agreed upon outside of the policy, the clause of forfeiture contained therein does not apply (*N. E. Mut. Life Ins. Co. v. Hasbrook*, 32 *Ind.* 447; *McAllister v. N. E. Mut. Life Ins.*, 101 *Mass.* 558).

XI. If the defendant by its course of dealing with Dr. Butler led him to believe that payment of premiums would not be required at the times stated in the policy, it is estopped from claiming a violation of the conditions of the policy in that regard (*Helme v. Philadelphia Life Ins. Co.*, 61 *Pa. St.* 107; *Thompson v. St. Louis Mut. Life Ins. Co.*, 2 *Ins. Law J.* 422; *Heaton v. Manhattan Fire Ins. Co.*, 7 *R. I.* 502; *Meyer v. Knickerbocker Life Ins. Co.*, 51 *How. Pr.* 263).

XII. The defendant's second exception, relating to

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Defendant's points.

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the exclusion of testimony concerning its cancellation of the policy, in December, 1872, and concerning its practice, with reference to the actual entry of the cancellation, is untenable.

*George Bliss*, attorney, and of counsel for defendant, among other things urged:—I. The premiums were never in fact paid, either in money or advertising.

II. There was no credit given or waiver which operated to excuse the defaults and leave the policy in force at the time of the death, because by Dr. Butler's own avowal to Lambert, he procured the receipt to be sent him by an agreement to send the money as soon as he got them, *i.e.*, on delivery, and because a waiver of condition of prompt payment was beyond the power of the persons who are alleged to have made the waiver, and that want of power was known to Dr. Butler, though this was not necessary (*Van Allen v. Farmers' Joint Stock Insurance Co.*, Court of Appeals, 5 *Ins. Law J. October*, 1876, 729, 732; *Mersereau v. Phoenix Mut. Life Ins. Co.*, Ct of Appeals, May 30, 1870, 5 *Ins. Law J. October*, 1876, 765; *Blossom v. Lycoming Fire Ins. Co.*, Ct. of Appeals, 5 *Ins. Law J. April*, 1876, 302; *Bush v. Westchester Fire Ins. Co.*, 63 *N. Y.* 531).

The same objection of a want of power applies to all subsequent acts which may be alleged to constitute a waiver of the condition as to payment,—such as the sending of the notices in January, 1872,—though that was obviously an inadvertence.

III. The letter, May 8, 1872, from Butler, bases a claim upon the possession of the receipts. If up to that time it could be held that there was a binding recognition of the policies as in force, and a giving of credit for the premiums, this was surely terminated by Mr. Keyes' letter of May 10, 1872, and the statement of account inclosed in it, that showed a balance due the

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Defendant's points.

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company of \$132.52, and called for payment, which was not made.

That being the condition of matters, in July, 1872, Dr. Butler sent his check for \$66.15. Even if we concede that he intended it to apply in payment of the premiums to become due on July 18, he did not say so, and the company were not bound to so apply it. They had notified him that he owed them money before that—an assertion which is now shown to be true beyond question. They could refuse to receive his money entirely, or receive it and apply it on the overdue balance; certainly if, in the latter case, they notified him of their action. This they did by letter of July 15, 1872, three days before the maturity of the first of the premiums, to which it is now alleged it should be applied, and from that application he never dissented until November following.

It seemed at the trial to be claimed that the action in so receiving and crediting the money received was to be regarded as a waiver and a conclusive recognition that the policy was then in force. But the company's act—if it was the act of the company—must be taken as a whole. You cannot say the receiving the money was a recognition of a valid policy, but the application of the money was unauthorized. That would be like taking half of an admission (*Insurance Co. v. Newton*, 22 *Wall.* 32). You must take it all together. So regarded, it was at most an expression of the willingness of the company to treat the policy as in force provided the overdue premiums were paid.

IV. When the fraud practiced upon the company in the matter of the advertising bill was discovered by them they had a right to revoke all their action based thereon and to be put back in the same position they were before they were misled by such fraud. This included a right to declare the policy forfeited for non-payment of premiums. Even if it is conceded that under or-

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Opinion of the Court, by SPEIR, J.

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dinary circumstances the company could not, after it had once given credit for a premium, thereafter declare the policy forfeited for non-payment of that premium, still this has no application to a case where the credit is obtained by a false and fraudulent representation, as we claim was made to us by the presentation of the bill for advertising which had not been done. If it is denied that the act was fraudulent, then we say the denial of our request to go to the jury on that ground was error. Here we exercised our right to declare the policy forfeited, when in January, 1873, we refused to receive the premium tendered for the next six months, notifying his agent who made the tender that we had been deceived by Dr. Butler. Mr. Rollins expressly tendered only for the premium then about becoming due. But we do not admit that if a temporary credit is given for the payment of a premium, thereby all right of forfeiture for that premium is forever gone. We say that the company must still have the right to insist upon the forfeiture after reasonable notice to pay up is given, and that in this case such notice was given.

BY THE COURT.—SPEIR, J.—As to the question of the payment of the premiums for the second insurance year the evidence is conclusive that a receipt for the annual premium of \$52, on the policy for \$2000, was sent to Dr. Butler by defendant with a statement that they were charged to him. The first semi-annual premium of the third years' insurance was paid to defendant together with the premium on a \$3000 policy, by Dr. Butler's check for \$66.15. These are the facts relating to the payment of the premiums involved in the issue by the pleadings. The second semi-annual premium of the third insurance year, and the first semi-annual premium of the fourth insurance year, during



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Opinion of the Court, by SPEIR, J.

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which Dr. Butler died, were duly tendered to the defendant.

The first question of law in the case is—Did Dr. Butler become liable to pay such premium, and was the policy continued in force by the delivery of the renewal receipts for the second year, accompanied with the statement by the defendant that they were charged to him?

There can be no question where mutual accounts are kept between the parties, that charging a premium to the account of the insured, is equivalent to payment. It is to be remembered in this case, the business was transacted between the insured and the acting officers of the company, and not by its agents. The defendant's president, Dr. Lambert, testified that Dr. Butler told him he had asked the company's secretary to send him the receipts, telling him that he would send the money, and thereupon Lambert told Dr. Butler that by the provisions of the policy the receipts would not be good for anything until he had paid, and that they were good for nothing. It is evident that the defendant did not cancel the insurance, but considered the policy still in force and the credit still continuing for three months after the alleged conversation. In January, 1872, it sent prematurely to Dr. Butler a notice of premium to become due on the 18th of that month. The defendant's secretary wrote to him May 10, 1872, that the sending the notice in January was "of course an inadvertence," and he enclosed a *statement of account*, and proposed that thereafter when Dr. Butler took defendant's receipts for premiums, he should give "at the same time a due-bill, and then each side has evidence of the settlement up to a given date." The defendant's secretary wrote to him on July 15, 1872, that his check for \$66.15 had been credited *to his account*. The defendant also wrote to Butler on September 25, 1871, that he was charged

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Opinion of the Court, by SPEIR, J.

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on the *second year* with \$2.51, the balance against him on the settlement for the first year. The facts conclusively show that the defendant did keep an account with Dr. Butler during the second insurance year, and did continue to give him credit. The premium was paid when the receipts were given (*Prince of Wales, &c. Co. v. Harding, Ellis & Bl. Q. B. 181*).

The second question is—Did the acceptance of Dr. Butler's check for \$66.15, sent July 12, 1872, enclosed with a notice of premium falling due on July 18, 1872, and its collection by defendant, waive any previous default, and continue the policy in force to January 18, 1873?

The company wrote to him that his check had been received and credited to his account, and that it was not sufficient to balance his indebtedness on the last year's premiums, and requested a remittance. Dr. Butler had paid the second year's premiums by the insertion of advertisements, and he held the defendant's receipts therefor; and in May, 1872, he wrote its secretary that notices had been erroneously sent in January, for payments to fall due that month. The defendant's secretary replied that the sending of notice in January was of course an inadvertence. Moreover, Dr. Butler had specified the purpose for which the check was sent. The rule is, that the party paying has the right to make the application at the time of payment, which he may do either by words or by conduct indicating his intention (*Stone v. Seymour, 15 Wend. 19; Simpson v. Jughan, 2 Barn. & Cress. 65*).

The defendant's fifth exception was to the denial of its request to go to the jury upon the ground of fraud alleged to have been practiced by Dr. Butler in rendering bills for advertisements which were not inserted.

From an examination of all the evidence it is apparent that the alleged fraud was merely a mistake, to

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Statement of the Case.

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which Dr. Butler called defendant's attention as soon as discovered and from which no injury resulted. There is no allegation in the answer that there was any fraud in the bills presented for payment for the insertion of advertisements in the "*Reporter*," at the time of settlement and the delivery of the renewal receipts, though the facts at the time must have been well known.

The defendant's second exception relates to the exclusion of testimony concerning its cancellation of the policy in December, 1872, and what its practice was with reference to the actual entry of the cancellation. There was no evidence or offer of evidence to show that Dr. Butler or the plaintiff had any knowledge or intimation of the cancellation or of defendant's practice. No valid cancellation of a policy can be made during a period covered by a paid or tendered premium, or during the term of a credit which has not been terminated by a legal demand of payment and notice that default will be followed by forfeiture.

The plaintiff must have judgment upon the verdict in accordance with plaintiff's motion.

CURTIS, Ch. J., concurred.

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PHILIP A. MADAN, PLAINTIFF AND RESPONDENT,  
v. ROBERT SHERRARD, JR., PRESIDENT OF  
THE NEW YORK TRANSFER CO., DEFENDANT  
AND APPELLANT.

I. *CARRIERS OF GOODS. BAGGAGE EXPRESS.*

1. Limiting their liability by clauses of agreement inserted in instruments delivered by them on the receipt of goods for carriage.
  1. Effect of instrument as limiting liability.

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Statement of the Case.

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## 1. Test of.

## 1. THE CHARACTER IN WHICH IT WAS RECEIVED IS.

(a.) If received and taken by the party delivering the goods for carriage as a contract between him and the carrier, the clauses of limitation will be binding; otherwise not.

## 2. PRESUMPTION AS TO THE CHARACTER IN WHICH THE INSTRUMENT IS RECEIVED ARISING FROM ITS NATURE.

1. *Bills of lading and other commercial instruments.*

Persons receiving them are *conclusively presumed* to know that they contain the terms on which the property is to be carried, and to have assented thereto (62 N. Y. 179).

BUT,

2. *Where the business of the carrier is the carriage of the luggage of travellers from railroads, steamboats, &c., to their residences, or to other railroads, steamboats, &c., and he employs agents to go on trains of cars, and steamboats, &c., and solicit from the passengers such carriage, and such agent, on receiving the luggage, or the railroad or steamboat check therefor, gives to the passenger a printed slip, after having written thereon a description of the luggage by the number of the check received, or otherwise, there is no such conclusive presumption; and the question as to the character in which the paper was received is to be determined by the surrounding circumstances.*

## (a.) DOMESTIC BILL OF LADING.

The placing of these words on the paper does not alter the rule.

## II. APPLICATION OF PRINCIPLES.

The plaintiff (Madan) was in a car coming to the city of New York. Defendant's agent came into the car asking for baggage. Plaintiff beckoned to him; he came to plaintiff, took his railroad check for his trunk, asked his address, wrote the number of the check and the address on the paper, which it is now claimed constituted a contract of limitation, handed it to plaintiff, and passed on. This is all that occurred. There was evidence that the light in the car was so poor and dim as to render it impossible to read. The agent wrote the number and address by the aid of a lantern which he carried on his arm. Plaintiff did not read or know the contents of the paper, except the number of the check and the

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Statement of the Case.

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address. He did not try to read it, but immediately folded it up and put it in his pocket. There was evidence that plaintiff had before received from baggage carriers receipts for baggage intrusted by him to them, but no evidence that he had ever read them or knew their contents. It was also in proof that he had sent merchandise and freight by carriers, in which cases he read the receipts. Plaintiff testified that he knew the paper related to the carriage of his baggage, and that it was the only hold he had on the company.

**HELD**

1. A charge, that if under all the circumstances the jury believed plaintiff knew that the agent proffered the paper as a contract, and accepted it as such, he is bound by it, no matter whether he knew the contents or not, and his recovery must be limited to \$100, but if they thought that plaintiff did not know that the paper was meant to be a contract and had no reason to believe so and could not have read it, then he was entitled to recover the value of the goods lost;—

Contained no error calling for a reversal.

2. That a refusal to charge, that if plaintiff did not attempt to read or examine or think of reading or examining the paper, the absence of light in the car was immaterial,

Was no error.

3. That refusal to charge in terms, "that if there were sufficient facts about the delivery of the paper under the circumstances of the case to challenge plaintiff's attention as a man of ordinary discretion in view of the mode of doing business with which he was familiar, that it related to a portion of defendant's duty with respect to his baggage, then he is bound;"

Did not under the evidence in the case constitute error.

4. That the judgment entered upon a verdict for the value of the property should be affirmed.

Before CURTIS, Ch. J., and SPEIR, J.

*Decided May 8, 1877.*

The plaintiff sues the defendant as a common carrier for the value of a trunk and contents, upon the ground that the same was lost by defendant's negligence. The answer admits that the defendant is a carrier for hire, but alleges an agreement limiting the

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Statement of the Case.

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liability of the defendant in case of loss to \$100, unless specially agreed for. That no such extra risk was agreed or paid for.

The appellant's agent gave to the respondent, while he was traveling on the New York and New Haven Railroad, a receipt or check for the trunk, to deliver the same at No. 47 West Forty-seventh street, N. Y., and took his brass check therefor. It was about 10 o'clock in the evening of September 1. The agent was passing through the car in which the respondent was seated, asking for baggage; the respondent beckoned to him, he came to the respondent and asked his address, took the railroad check for the trunk, and wrote the number of such check and respondent's address on the receipt, by the light of the lantern he had on his arm, and passed on. Nothing was said about the contents of the receipt, and no remarks made except, to ask where the trunk was to be delivered. The respondent did not read or know the contents of the receipt, except the number of the brass check and the place where the trunk was to be delivered. It was never delivered. When the plaintiff received the receipt he immediately folded it up and put it in his pocket, and did not try to read it.

There was evidence that the light in the car was so poor and dim as to render it impossible to read. There was also evidence that plaintiff had before received from baggage carriers receipts for baggage entrusted by him to them, but no evidence that he had ever read them or knew their contents. It was also in proof that he had sent merchandise or freight by carriers, in which cases he read the receipts. Plaintiff testified that he knew the paper related to the carriage of his baggage, and that it was the only hold he had on the company.

The paper given to the plaintiff was as follows :

Statement of the Case.

Defendant's Exhibit A.

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NEW YORK TRANSFER COMPANY, {  
PRINCIPAL OFFICES:  
Nos. 944 and 946 Broadway, New York,  
and  
10 Court St. (City Hall Square), Brooklyn.  
—DODDS EXPRESS.—

RATES  
For Extra Value,  
10c per \$100.

THE NEW YORK TRANSFER COMPANY  
hereby accepts an additional risk of  
dollars upon property  
embraced in this bill of lading.  
Insurance, \$  
Agent.

DOMESTIC BILL OF LADING.

RECEIVED OF \_\_\_\_\_ this 1 day of Sep. 1873  
Articles Numbered as in the margin  
hereof (contents unknown), subject to this Bill of Lading for which  
this Company's charges are based upon a gross valuation not ex-  
ceeding ONE HUNDRED DOLLARS upon any Trunk, Chest,  
Valise, Bag, Box, or Parcel including the contents thereof, always  
y, or Jewelry, contained in Baggage,  
for which this Company will not become liable in any event.

DOMESTIC BILL OF LADING.

To be delivered at 30 W. 47.  
It is mutually agreed, and is part of the consideration of this contract, that the NEW  
YORK TRANSFER COMPANY shall not be liable for Merchandise Meneu or Jewelry con-  
tained in Baggage, nor for loss by Fire  
otherwise, for  
Valise, Bag, I  
writing and note  
Company shall  
r the same has  
shall not be liable for loss or damage, unless the claim therefor be  
his Contract annexed, at their Principal Office, within thirty days  
after such loss or damage. And the owner hereby agrees that said Company shall be liable  
only as above.  
Charges Paid Collect.  
For the Company, PARKER, Agent.

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Statement of the Case.

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After the close of the evidence on both sides defendant's counsel moved that the court direct a verdict for the plaintiff for \$100; which motion was refused and exception taken.

He also requested the court to instruct the jury as matter of law that the delivery of this receipt to the shipper at the time of the receipt of the property, constituted a contract under the circumstances of this case, and the plaintiff is limited in his recovery to \$100 as the value of the property; which was refused and exception taken.

The court thereupon charged the jury in substance:

"If Mr. Madan received the paper as a contract, then he can only recover \$100; and it is within your province, if you think it necessary to compensate him further, to add seven per cent. interest on that \$100, from the first day of September, 1873.

"On the other hand, if you think that Mr. Madan did not know that that was meant to be a contract, and had no reason to believe so, and could not have read it, then he is entitled to recover the value of the goods he lost."

Defendant's counsel asked the court to charge the jury "That if there were sufficient facts about the delivery of this paper under the circumstances of the case, to challenge his attention as a man of ordinary discretion, in view of the mode of doing business with which he was familiar, that it related to or pertained to defendant's duty, with respect to the baggage, that then he is bound."

Thereupon the the court thus instructed the jury: "I cannot charge you in that way. I can charge no further than this; that if from all the circumstances of the case the jury believe Mr. Madan knew that Bishop proffered that as a contract, and he accepted it as such, he is bound by it, no matter whether he knew the contents or not."



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Appellant's points.

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Defendants' counsel then asked the court to charge the jury "That if the plaintiff did not attempt to read or examine, or think of reading or examining the paper Exhibit A, the absence of light in the car was immaterial."

The court refused so to charge. The defendant's counsel duly excepted to each of the refusals of said justice to charge as above requested.

The jury rendered a verdict for plaintiff for \$414.25.

From the judgment entered on the verdict, defendant appealed to the general term.

*Luke A. Lockwood*, attorney, and of counsel, for appellant, among other things, urged :—

I. The law is well settled that, in the absence of fraud or imposition, the receipt delivered by the agent of defendant to the person shipping the package, must be held to be the contract between the parties (*Collendar v. Dinsmore*, 55 *N. Y.* 200 ; *Magnin v. Same*, 56 *Id.* 168 ; *Kirkland v. Same*, 62 *Id.* 171). It is not pretended that there was any fraud or imposition in this case.

II. 1st. The learned judge erred in refusing to charge, as first requested after the close of his charge. 2nd. The learned judge erred in refusing to charge, as secondly requested after the close of his charge, because the evidence showed that the plaintiff neither tried to read the contract, nor did it occur to him to read it. What possible effect could the state of the light in the car have had? Undoubtedly the evidence, as to light, was suggested by the case of *Blossom v. Dodd* (43 *N. Y.* 264). Particular attention is requested to the form and appearance of the paper relied upon by the defendant, in that case, which was thought of so great importance as to require its exact reproduction at page 265. That case turns upon the character and appearance of the paper itself. The court says,

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Respondent's points.

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however, "The delivery and acceptance of a paper containing the contract, may be binding though not read, provided the business is of such a nature, and the delivery is under such circumstances, as to raise the presumption that the person receiving it knows that it is a contract containing the terms and conditions upon which the property is received to be carried," and cites with approval the opinion of the court in *Grace v. Adams* (100 *Mass.* 560). "It is not claimed that he did not know, when he took it, that it was a shipping contract or bill of lading." So in *Van Toll v. The S. E. R. Co.* (104 *Eng. Com. Law R.* 75), the same principle was decided. MILLER, J., said, "Assuming that the plaintiff did not read the terms of the condition, it is evident she knew they were there." The bill of lading in this case, Exhibit A, is inserted that the court may see that it is not a "card or check" for baggage calculated "to repel the idea of a contract, but to *invite* attention to it as a contract."

III. The facts of this case bring it directly within the principle decided in *Kirkland v. Dinsmore* (62 *N. Y.* 176).

J. T. C. Campbell, attorney, and of counsel, for respondent, among other things, urged:—

I. The fact is, the car being dimly lighted, so that the plaintiff could not read the paper presented, he had a right to infer it was nothing more than a token given in exchange for his check, and he cannot be presumed to know it contained a contract, and did not in fact contain any. The most that could be said was it contained matter by which the defendant wished to entrap the plaintiff with a contract. If the defendant meant to deal honestly, it should have informed plaintiff of the contents of the paper, and given him an opportunity to have assented to its terms or dissented. We claim as in the case of *Blossom v. Dodd*. *First.* The

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Respondent's points.

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transaction was not such as necessarily charged the plaintiff with knowledge *the paper contained a contract*. *Second*. The circumstances repel the idea that plaintiff had knowledge that the receipt contained a contract or that the plaintiff assented to its terms. The case is in all essential particulars like the case of *Blossom v. Dodd*, and the court should have directed a verdict for plaintiff without submitting the case to the jury, as there was no evidence, in fact, on which they could find for the defendant. The defense could not be maintained without violating the established rules as to contracts, and without completely overthrowing the laws which are absolutely necessary to ensure fair dealings on the part of common carriers (*Butler v. Heand*, 2 *Campbell*, 515; *Blossom v. Dodd*, 43 *N. Y.* 264; *Prentice v. Decker*, 49 *Barb.* 21; *Lemuegierger v. Wescott*, 49 *Id.* 283; *Parker v. The South Eastern R. Co.*, *Law and Equity Reporter*, vol. 2, 599-600). He also commented on the cases of *Kirkland v. Dinsmore*, 62 *N. Y.* 175; *Hollister v. Nowlen*, 19 *Wend.* 234; *Dorr v. New Jersey Nav. Co.*, 11 *N. Y.* 485; *Butler v. Herne*, 3 *Campb.* 414; *Prentice v. Decker*, 49 *Barb.* 21; *Limburger v. Prescott*, 49 *Id.* 283; *Grace v. Adams*, 100 *Mass.* 560; *Gall v. S. E. R. Co.*; *Parker v. South Eastern R. Co.*, 12 *Law and Equity Reporter*, 12.

II. The only real exception to the charge arose on the request of defendant to charge the jury if the plaintiff did not attempt to read or examine, or think of reading or examining, the paper, the absence of light in the car was immaterial. The fact there was no light sufficient to read was a fact proper to be proved in the case. It might have been the very reason why the plaintiff did not make the attempt to read the paper. The court properly commented on the subject in the charge, and to charge as requested would be doing the plaintiff injustice. On the whole case, it is

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Opinion of SPEIR, J.

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manifest justice has been done, and the judgment should be affirmed.

SPEIR, J.—The question in the case is, was the receipt, received by the plaintiff, taken by him as a contract between the parties? The jury were charged that if he did not accept it as a contract, and was not bound so to accept it, he was entitled to recover the full value of the property, and if he received it as a contract between them, then he can recover only the limited sum and interest. There is no positive evidence that the parties directly assented that the paper was to be taken as a contract, and the point is, do the facts and circumstances show that the plaintiff knew or should have known that it was more than a mere receipt, but an implied contract, the terms of which he should have informed himself.

It is apparent from the plaintiff's testimony that he was acquainted with the nature of express receipts, that he had traveled upon railroads and boats, and received receipts for packages and freight, and that he had received receipts similar to the one given him. This would show that he had or ought to have knowledge that the receiving of packages or freight by express, or the common carrier, must be in writing. The terms for carrying vary as to distances to be carried, weight, quality, and character of the property to be carried. The business itself implies an express contract, the terms of which are to be ascertained. In such a case the party is bound to treat the paper as a contract when he takes it, and must be assumed to do so. But in the case of carrying a trunk from a railway station to one's residence, by express, and delivering into the hands of an agent a check containing the number, and receiving a receipt, does not necessarily imply terms of limitation to be set down in writing. It may be an implied contract, and it might or it might

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Concurring opinion of CURTIS, Ch. J.

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not contain terms of limitation. In such a case a person to whom the receipt is delivered, is not obliged, as matter of law, to make himself acquainted with its terms, and bound by them as if he had done so. This distinction is taken and clearly expressed in a recent case, decided in May, 1876 (*Parker v. The South Eastern R. Co.*, *Law and Equity Reporter*, vol. 12, p. 12). From the defendant's using a lantern to write what he did, it is pretty evident that the light in the car was not sufficient to read by (*Blossom v. Dodd*, 43 *N. Y.* 264). Although this is not conclusive evidence that the plaintiff might not have read the paper had he tried to do so, there was nothing in the transaction which obliged him to make himself acquainted with its terms. There was not evidence enough to show that the plaintiff must have known, or ought to have known that the receipt contained some agreement which limited defendant's liability. As the common law liability cannot be restricted by notice merely, the question of knowledge was properly left to the jury. The learned judge in terms charged if the plaintiff accepted the receipt as a contract, he was bound by it whether he knew it or not. The defendant relies upon the cases of *Grace v. Adams* (100 *Mass.* 560), and *Van Toll v. The S. E. R. Co.* (104 *Eng. Com. Law, R.* 75), to show that parties are bound by such receipts. In the first case it was held from the nature of the transaction the party was presumed to have assented to the terms although he had not read the paper. In the other case there was evidence that the plaintiff assented to the terms.

The judgment and order appealed from must be affirmed, with costs.

CURTIS, C. J., concurring.—The decision in the case of *Blossom v. Dodd* (43 *N. Y.* 264), governs the present case. The evidence sustains the finding of the jury that there was no contract. In this case, as in *Blossom*

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Concurring opinion of CURTIS, Ch. J.

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v. Dodd, no intimation was given that the memorandum handed back (apparently as a receipt for the plaintiff's baggage), contained a contract to limit the carrier's liability. The same circumstances also exist to repel the idea of a contract. There is the same impossibility to read in the dimly-lighted car; and the printing in fine type of the so-called contract, though not quite so fine, is made still more illegible by night in the present case than in that, from being printed in pale green ink. The case of *Kirkland v. Dinsmore* (62 N. Y. 179), refers to the ruling in *Blossom v. Dodd* (*supra*), and maintains the distinction between a traveler receiving a card or ticket for his convenience, and protection in having his luggage carried by a porter from a railway station to his lodgings, and the transaction of commercial business through bills of lading and other instruments of that character.

No case holds that a traveler, receiving a receipt of this nature, and under like circumstances, where it is impossible to read it, and no intimation is given him of its embracing a contract, is bound by such contract. Besides, there are intrinsic difficulties in extending any such immunity from liability, to parties engaged in the portage of travelers' baggage at night in large communities. The printing near the commencement of the receipt, the words "Domestic Bill of Lading," does not obviate the distinction drawn in the cases above referred to, though possibly so intended.

The court properly left the questions of fact, arising on the trial, to the jury.

I concur in the affirmance of the judgment and order appealed from.

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Statement of the Case.

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FRANCIS A. PALMER, PLAINTIFF AND APPELLANT,  
v. JOHN FOLEY, DEFENDANT AND RESPONDENT.

I. *INJUNCTION.*

1. ORDER OF REFERENCE, under the undertaking, to ascertain damages.

1. LIABILITY ON THE UNDERTAKING, EFFECT OF QUESTION AS TO, ON THE GRANTING OR REFUSING AN ORDER OF REFERENCE.

(a) *If it be perfectly clear that no action will lie, the order will not be granted.*

(b) *If it be not perfectly clear that no action will lie, the order will be granted.*

1. DOUBT, WHAT SUFFICIENT TO AUTHORIZE ORDER OF REFERENCE.

*See infra.*

2. UNDERTAKING.

1. RIGHT OF ACTION ON, QUESTIONABLE WHEN.

(a) *Discontinuance of the action.* The plaintiff obtained an order requiring defendant to show cause why an injunction should not be granted against him, and in the meantime enjoining defendant; on this temporary injunction the undertaking in question was given; on the return of the order to show cause, the court, after hearing both parties, ordered that the order to show cause be made absolute, and that defendant be enjoined, etc. On appeal by defendant from this order, the general term modified it, and affirmed it as modified. After this, defendant's attorney gave a consent for the discontinuance of the action without costs. Upon this consent plaintiff entered an order of discontinuance without costs. Defendant's attorney gave the consent on receiving \$100 for costs.

HELD,

1. That it was not perfectly clear, that there was no right of action on the undertaking.

2. That there was enough doubt on that point to authorize an order of reference as to damages.

Before CURTIS, Ch. J., SEDGWICK and SPEIR, JJ.

*Decided May 8, 1877.*

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Opinion of the Court, by SPEIR, J.

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An appeal from an order granting a reference to ascertain damages upon an injunction. The injunction was modified, but not vacated, and leave was granted to plaintiff within ten days after service of supplemental answer, to re-enter an order dismissing the complaint on payment of costs. The supplemental answer was served, and after the ten days had expired, and the case noticed for trial and on the calendar, the attorneys assented to the discontinuance of the action, and an order was entered accordingly.

The plaintiff, as chamberlain of the city, alleged title to the office in his own deputy, and charged the defendant as a mere *intruder*. The defendant denied this and set up title to the office. A temporary injunction was issued with order to show cause. On the return of the order, being opposed by the defendant, the injunction was continued. The defendant appealed to the general term, which continued the injunction but modified it.

The question is, did the mere consent to the entry of the order of discontinuance deprive the defendant of his right to damages.

*William Meredith Field*, for appellant.

*R. W. Townsend*, attorney, and *A. R. Dyett*, of counsel, for respondent.

SPEIR, J.—It appears that the order to discontinue the action was made upon the plaintiff's motion, and the same was discontinued upon the payment of defendant's costs. It is difficult to see how such a motion could be successfully opposed by the defendant. The plaintiff would have had the right to do so upon payment, or tender of the costs. If the defendant had sustained damages by reason of the issuing of the injunction which the plaintiff became liable to pay, the mere discontinuance of the suit by order of the



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Dissenting opinion of CURTIS, Ch. J.

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court on plaintiff's application, could not discharge that liability. The liability had already occurred, and unless the order of the court, in terms, relieved the plaintiff, he has nothing to show for his release. The plaintiff, by his application to discontinue, waived any right he may have had to the order, and the defendant had a right to the trial of the action, and to an appeal from the judgment therein to the general term, and to the court of appeals, if the judgment had been affirmed. As the case stands, the issuing of the injunction upon obtaining sureties to the undertaking, the motion to continue, and the modification on the appeal, together with the plaintiff's voluntary discontinuance of the suit, raise at least the presumption of liability. The measure of liability must be determined by the order of reference. The order must be affirmed with costs.

SEDGWICK, J.—There is enough doubt as to the liability upon the undertaking under section 222 of the Code, to make the case of *Carpenter v. Wright* (4 *Bosw.* 655), applicable. By that case, unless it is perfectly clear that no action will lie, the liability should be determined in an action upon the undertaking.

I, therefore, concur in affirming the order with costs.

CURTIS, Ch. J. (dissenting).—The defendant's claim for damages, alleged to have been sustained in consequence of the temporary injunction granted to the plaintiff herein, is based upon that provision in section 222 of the Code, securing such damages to the defendant, "as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto."

So far as the temporary injunction is concerned, and it is the only one granted in the action, the decision of the court at the special term held, that the plain-

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Dissenting opinion of CURTIS, Ch. J.

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tiff was entitled to it; and this decision was substantially affirmed on appeal at the general term. There is no other decision by the court in respect to it. Unless the parties, by their own action, have placed the right of the plaintiff upon a different footing, it is difficult to see how the court has finally decided that the plaintiff was not entitled to it.

The only action of the parties affecting the injunction, appears in a stipulation subscribed by their respective attorneys, April 24, 1874, in these words, "On payment of \$100 costs to the defendant, we hereby consent to the discontinuance of the above entitled action without costs, and that an order may be entered to that effect."

Upon the payment to the defendant of the \$100 costs, and the reading and filing of this stipulation of the parties, the court ordered the action to be discontinued.

In November, 1876, this application for an order of reference to ascertain damages by reason of the injunction was made.

By this discontinuance, the injunction with the consent of both parties ceased to be operative. The discontinuance was not the sequence of any decision or act of the court, but the carrying out simply of an agreement or bargain between the parties, that such an order should be made on the payment to the defendant of a certain sum of money, which was then paid to him by the plaintiff.

None of the cases referred to upon the argument, disclose this state of facts, in the discontinuance of an action, or indicate that such a contract of the parties *inter sese*, is to be construed into, or is tantamount to, a final decision by the court, adversely to the plaintiff's right to an injunction.

If the defendant had wished to protect any claim for damages by reason of the injunction, he should

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Statement of the Case.

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have been careful not to have waived the condition in section 222 of the Code. The defendant was not required to sign any agreement as to terms and discontinuance, but having voluntarily done so, there is an embarrassment in discerning how his own act in discontinuing the suit, and rendering the injunction inoperative, can be viewed as the decision of the court, that the plaintiff was not entitled to the injunction.

It is true, that the demand is somewhat stale, and made against a public officer, long after his retirement from his official position ; but those are features which I have not considered.

The order appealed from should be reversed with costs.

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FREDERICK W. GRIFFITH, *et al.*, PLAINTIFFS  
AND APPELLANTS, v. DARIUS R. MANGAM,  
DEFENDANT AND RESPONDENT.

I. CORPORATIONS.

(1.) Section 5 of the act of New Jersey entitled "an act concerning corporations," approved February 14, 1846.

1. STOCKHOLDERS, LIABILITY OF TO CREDITORS UNDER THIS SECTION, HOW TO BE ENFORCED.

(a.) *By an equitable action only*, brought by or on behalf of all the creditors against the corporation, making all the delinquent debtors also defendants, to assess upon and recover from each their *pro rata* shares of the debts.

Before CURTIS, Ch. J., SEDGWICK and SPEIR, JJ.

*Decided May 8, 1877.*

This is an appeal from a judgment dismissing the complaint on referee's report.

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Appellant's points.

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The plaintiffs recovered a judgment for work, &c., against the Patent Lock Shank Button Company, a foreign corporation, incorporated under special act of the legislature of the State of New Jersey. Execution was returned unsatisfied. The defendant was sued as a stockholder, holding stock not fully paid for, in an amount exceeding plaintiffs' claim.

The following statute is relied on by the plaintiffs to maintain their action: "When the whole capital of a corporation shall not be paid in, and the capital paid shall not be sufficient to satisfy the claims of the creditors, each stockholder shall be bound to pay, on each share held by him, the sum necessary to complete the amount of such share as fixed by the charter of the company, or such proportion of that sum as shall be required to satisfy the creditors of the company."

*Kelly & McCrea*, attorneys, and of counsel, for appellants, upon the question discussed in the opinion, urged:—I. The statute of New Jersey imports a several and individual liability.

This would be undoubtedly so under the ordinary reading of the statute, *each* stockholder meaning *not all*, but each, separate, and independent. But we are not left to any original construction of the statute for its meaning. Analogous statutes have been expounded, not only in our own courts, but in the courts of other States, and in other forums, which leave no doubt that the provision of the statute now under examination should be construed to mean, as against stockholders, a *separate* and *several* liability, rather than a joint one (*Bank of Poughkeepsie v. Ibbottson*, 24 *Wend.* 473; *Paine v. Stewart*, 33 *Conn.* 516; *Stanton v. Wilkinson*, *N. Y. Times*, Feb. 20, 1876; *Sanger v. Upton*, 1 *Otto* [*U. S. Sup. Ct.*] 56; *Kennedy v. Gibson*, 8 *Wall.* 498; *In re Hollister Bank*, 27 *N. Y.* 393).

II. While the plaintiff might have availed himself

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Appellant's points.

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of an action against all the stockholders, both on behalf of himself and any other creditor who might choose to come in, we insist that he was not bound to pursue this remedy alone. Upon principle, we think, this action is not to be distinguished from the suit of a creditor seeking to recover its debt from a person having assets belonging to an insolvent corporation (*Bartlett v. Drew*, 57 *N. Y.* 587; *Garrison v. How*, 17 *Id.* 458; *Sanger v. Upton*, 1 *Otto*, 56; *Sawyer v. Hoag*, 17 *Wall.* 610; *Mann v. Pentz*, 3 *N. Y.* 415; *Story's Eq. Jur.* § 1252; *Tinkham v. Borst*, 31 *Barb.* 407; *Ogilvie v. Knox Ins. Co.*, 22 *How. U. S.* 380; *Weeks v. Love*, 50 *N. Y.* 568).

But it will be urged by the defendant here that the case of *Bartlett v. Drew* is not in point—that it has no application in its bearing upon the question of a stockholder's liability. Let us see if this be so. *Unpaid stock* is as much a part of the property or assets of an insolvent corporation as any other part of its property. There is no distinction. In the words of SWAYNE, J., in *Sanger v. Upton*, *supra*, “Unpaid stock is as much a part of this pledge (trust fund) and as much a part of the assets of the company, as the cash which has been paid in upon it. As *regards creditors* there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation.”

If this reasoning is sound, and speaking as it does the large and profound learning of the supreme court of the United States, we may well deem it to be correct, then the case of *Bartlett v. Drew*, we contend, has not only a very close but controlling application to the one at bar. And, in that view, we think, to use the language of the opinion in that case, “that the consideration of the questions in respect to parties and the form of the action quite unnecessary.”

III. In opposition to the line of argument contended for in the foregoing points, it will doubtless be urged

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Respondent's points.

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now, as it was before the learned referee, that there are authorities in this State opposed to the conclusions we have arrived at, and which are fatal to them. And among these authorities is the case of *Mann v. Pentz* (3 *N. Y.* 415). Now, instead of considering this case an authority for the defendant, we think its entire scope and spirit in harmony with the views and position of the plaintiffs which we have already presented, and we are supported in this conclusion by the decision in *Bartlett v. Drew, supra*.

IV. We consider that it follows from our assumption of the nature and effect of the defendant's liability herein, that the remedy is not given to *all the creditors jointly*, but that it is available to each creditor as a *several and distinct* right. And we are firmly supported by authority in many of the cases already cited for this view of the statute (*Bank of Poughkeepsie v. Ibbottson, supra*; *Briggs v. Penniman*, 8 *Cow.* 387; *Garrison v. Howe*, 17 *N. Y.* 458; *Weeks v. Love*, 50 *Id.* 568).

*Arnold, Elliott & White*, attorneys, and *J. H. V. Arnold*, of counsel, for respondent, on the question discussed by the court, urged:—I. The defendant's liability, if any, rests wholly on section 5 of the act of New Jersey entitled "An Act concerning Corporations," approved February 14, 1846. This act is precisely the same as section 5, title 3, chapter 18, part 1, R. S. of New York. The courts of this State have held that under this New York statute the liability can only be enforced in an equitable action against the corporation and all delinquent stockholders by or on behalf of all the stockholders (*Mann v. Pentz*, 3 *N. Y.* 416). This disposes of the case at bar in favor of defendant. There are other New York decisions to the same effect made upon above cited section of the R. S. and on analogous statutes (*Talmadge v. Fiskkill Iron Co.*, 4 *Barb.*

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393 ; Morgan v. N. Y. and Albany R. R. Co., 10 *Paige*, 290 ; Matter of Hollister Bank, 27 *N. Y.* 305 ; Mills v. Stewart, 41 *Id.* 389 ; Osgood v. Layton, 3 *Abb. Ct. of App.*)

II. Under other statutes such as the acts of 1811 and 1848, it has been held that an individual creditor had a right of action against an individual stockholder. These acts, however, were entirely dissimilar in their provisions from the one in question.

III. The case of Bartlett v. Drew (57 *N. Y.* 589), is not in antagonism. That case was put on the ground that the defendant was in possession of assets of the corporation, to which he had no right or title.

BY THE COURT.—SPEIR, J.—The only question for review is whether the facts as found, without exception, sustain the conclusions of law. The fact is proved, as found by the referee, that there were other delinquent stockholders besides the defendant, and that the plaintiffs could not recover in this form of action.

It will be seen by reference to this special act, that the only provision under which stockholders are liable for any debts of the company, is contained in the general clause, providing that the corporation shall have all the powers and be subject to the restrictions and liabilities applicable to corporations generally, in the State of New Jersey, under the “act concerning corporations,” approved February 14, 1846, and the acts supplementary thereto. The fifth section of the act itself contains the provision under which the question arises.

No individual or several liability on the part of the stockholder is created by this section. The language is clear and explicit. There are two conditions of liability expressed, in terms. Where the whole capital of the corporation shall not have been paid in, and where the capital paid shall be insufficient to satisfy the claims of creditors, “Each stockholder shall be bound

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Opinion of the Court, by SPEIR, J.

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to pay on each share held by him the *sum necessary to complete* the amount of such share as fixed by the charter of the company, or pay *such proportion of the sum* as shall be required to satisfy the creditors of the company." The liability is incurred when the capital paid in is insufficient to satisfy the debts against the corporation, and then only to an amount sufficient for that purpose. The liability is to the creditors of the corporation—and not to the individual stockholders—to the extent of what remains unpaid upon their respective shares of the capital stock of the company, or of such proportions thereof as may be necessary to satisfy the debts of the corporation. An account must be first taken of the debts, of the assets, and of the amount of capital remaining unpaid upon the shares, and the amount unpaid by each stockholder, in order that they may be made equally liable, before each stockholder shall be bound to pay on each share held by him. In short, the stockholders under the statute are not liable to the company, but for the debts, and the debts are due to the creditors and not to the company (*Morgan v. N. Y. & Albany R. R. Co.*, 10 *Paige*, 290; *Mann v. Pentz*, 3 *N. Y.* 416). In this last case it was decided that only an equitable action by the creditors against all the stockholders to assess and recover from each their *pro rata* share of the debts would lie; and that no action on the part of the company could be maintained for that purpose. No one creditor of the company can maintain an action against an individual stockholder, for the reason that the liability created by the statute is to the creditors generally, and not to individual creditors, thus creating a liability to the creditors jointly. In equity, this liability enures to the creditors in proportion to the amount of their debts, respectively. A court of law cannot do justice between the parties in a joint action by all the creditors, and work out this equity.



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Statement of the Case.

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I have not been able to find any decision by the courts in New Jersey conferring directly or by implication any right of action to the corporation against stockholders, or any action at law to any creditor against an individual stockholder where stock is not fully paid up. The statutes under which the decisions in this State are uniform are in all respects the same as the one at bar. In all the cases these statutes have received but one interpretation—a joint liability on the part of delinquent stockholders to pay *pro rata* according to their stock, and a right on the part of the creditors to have such moneys applied *pro rata* and equitably in payment of their debts.

The judgment must be affirmed with costs.

CURTIS, Ch. J., and SEDGWICK, J., concurred.

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MATHEW T. BRENNAN, LATE SHERIFF, &c.,  
PLAINTIFF, v. JOACHIM ARNSTEIN AND  
PHILIP GOLDMAN, DEFENDANTS.

I. UNDERTAKINGS; SEVERAL IN AN ACTION.

1. RELEASE OF SURETIES TO A PRIOR ONE; EFFECT OF ON LIABILITY OF SURETIES TO A SUBSEQUENT ONE.

(a) The release by the party to whom the first undertaking is given or his assignee, of the sureties to that undertaking *does not release* the sureties on a subsequent undertaking given to him.

2. PAYMENT IN WHOLE OR IN PART BY THE SURETIES TO A PRIOR UNDERTAKING.

(a) *Reduces the liability* of the sureties on a subsequent one to the party to whom it is given, by the amount of such payment.

II. CLAIM AND DELIVERY.

1. UNDERTAKINGS IN ACTIONS OF, APPLICATION OF ABOVE PRINCIPLES.

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Statement of the Case.

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(a) A release of the sureties *to the undertaking given by the plaintiff on taking the property* from the defendants upon a receipt from them of a portion of the amount for which they are bound under their undertaking, will not release the sureties to an undertaking given by the plaintiff on appeal to the general term from a judgment rendered against him in the action for the purpose of staying execution; but they are entitled to have credited on the amount for which they are bound the sum received from the sureties on the first undertaking.

III. UNDERTAKING.

I. INSUFFICIENT TO STAY EXECUTION.

(a) SURETIES LIABLE THEREON NEVERTHELESS, WHEN.

1. When it has been accepted as sufficient and all proceedings have in fact been stayed on the faith thereof.

Before SEDGWICK and SPEER, JJ.

*Decided May 8, 1877.*

This is an appeal by the defendant Arnstein from an order denying a motion to vacate the judgment entered herein and the execution issued thereon and to allow him to defend the action.

In 1871, Caroline Pollock brought a replevin suit against the plaintiff in this action (being the defendant in that one) and she as principal and Wahlig & Matthias as sureties, executed an undertaking to procure the delivery of the property to her. The defendant in that action recovered judgment, and the plaintiff therein appealed to the general term and gave an undertaking on appeal to stay proceedings with the defendants in this action as sureties. The general term affirmed the judgment; the defendant in that action (being the plaintiff in this) thereupon brought this action on the undertaking given on appeal against both the sureties thereto (being the defendants in this action) and recovered judgment herein against them both by default. The plaintiff assigned this judgment and all the collateral undertakings to one Nathan Hutkoff, who brought

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Defendant's points.

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an action under the replevin undertaking, and the sureties to the undertaking. Wahlig & Mathias answered, but thereafter they paid to Hutkoff one-half the amount, and assigned to him all claims and rights of action which they had against Arnstein & Goldman by reason of their suretyship, and Hutkoff & Goldman executed to Wahlig & Mathias a release, of and from all claims and demands which they or either of them had against said Wahlig & Mathias or either of them arising out of the said undertaking executed by them. Hutkoff credited on the judgment in this action the full amount recovered from Wahlig & Mathias, and issued execution against both defendants for the balance.

*Simon Sultan*, attorney, and *Algernon S. Sullivan*, of counsel, for *Arnstein*, upon the points stated in the head note, urged:—I. Even leaving out the question entirely as to whether the defendant Goldman had paid the judgment, or Nathan Hutkoff had bought it, and assuming the latter to be the fact, the release of the replevin bond was a release of these defendants. 1. The sureties on the undertaking on appeal were, in fact, sureties for the parties to the replevin bond. The undertaking on appeal not having been in the form prescribed by section 336 of the Code, it did not stay proceedings on the execution (*Elliot v. Buckland*, 37 *How.* 71); being otherwise of no necessity in law, it was a mere gratuitous undertaking, creating no liability, not being supported by the statutory consideration (*Post v. Doremus*, 60 *N. Y.* 371). The sureties to the replevin bond, by the recovery of the judgment in replevin against their principal, had themselves become principal debtors bound by their obligation to effect a return of the property according to the judgment, and only if they failed to procure such return, the judgment was for a specific sum of money to stand *in lieu* of the property. The sureties on the undertaking on appeal

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Defendant's points.

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never agreed to look to the return of the property, but to the payment only of the *amount* directed to be paid by the judgment. That amount, however, was not due and payable, unless the sureties on the replevin bond had made default in their undertaking to procure a return of the property. The effect of the undertaking on appeal, therefore, was an obligation to become answerable for such default. Within every principle this created the relation of principal and surety (See *Wood v. Fisk*, 65 *N. Y.* 250, 251). The same reasoning applies to the relation here. The principals, the parties to the replevin bond, having been discharged, the sureties were discharged likewise (*Boyd v. McDonough*, 39 *How.* 389). 2. The case of *Hinckley v. Kreitz* (58 *N. Y.* 583), contains no principle applicable to this case, and the learned judge erred in deciding the motion upon the doctrine there laid down. *a.* The undertaking on appeal in that case was indispensably necessary to effect an appeal at all, whereas in this case, there was no such necessity. The undertaking in that case had the effect of staying proceedings on the execution, and to delay the collection of the judgment, the undertaking in this case did not stay anything (See *Elliot v. Buckland*, *supra*). *b.* It is argued in that case that the sureties on the first undertaking upon payment of the judgment when recovered had a right to stand in the place of a creditor as to all rights and remedies, but in order that the replevin sureties should have that resort here, they had necessarily to take an advantage of the breach of their own contract to have the property returned, for which default alone the money judgment, which the appeal bond secured, was payable. They could not take advantage of their own wrong. *c.* The principle in that case, and all the authorities cited in support of it, is that the interposition of the latter sureties was the means of involving the former into ultimate liability, and of securing a

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Respondent's points.

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delay. There was no such legal result by means of the undertaking on appeal here, which was gratuitous and unsupported by any consideration.

*L. A. Gould*, attorney, and of counsel, for *Nathan Hutkoff*, upon the points stated in the head note urged :

I. Upon his own admission, Arnstein is liable to the holder of the judgment for the full amount thereof. And as surety upon the undertaking last given, he is primarily liable (*Hinkley v. Kreitz*, 58 *N. Y.* 583). So far he has paid nothing ; if any sum is collected of him he may recover the whole amount from his principal, Pollock, and can demand contribution of his co-sureties if he pays more than the proportionate share (*Holmes v. Weed*, 19 *Barb.* 128 ; *Bonney v. Seely*, 2 *Wend.* 481 ; *Bradley v. Burwell*, 3 *Den.* 61 ; *Norton v. Coons*, 3 *Id.* 130 ; *Easterly v. Barber*, 3 *C. S.* 421 ; *Armitage v. Pulver*, 37 *N. Y.* 494).

II. The principal, Caroline Pollock, has never been discharged by any of the sureties, but if the other sureties had released her this could work no injury to the appellant, Arnstein, for he has not done so. The judgment against her remains in full force. Hutkoff, the holder of the judgment, could recover the full amount from any one of the four sureties, and if he compels payment from any one of them of a sum greater than his proportionate share, that one may claim contribution from the others. Payment of course can be required but once, and if any one chooses to pay the whole he forthwith may assume the position and rights of the judgment creditor to recover their proportion from the others (*Cuyler v. Ensworth*, 6 *Paige*, 31).

III. Appellant's theory that the release of the sureties on the first undertaking on their paying one-half of the judgment operated to discharge him from all

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Opinion of the Court, by SPEIR, J.

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liability, has no foundation in reason, and is without authority in law. The primary liability resting upon the appellant and Goldman, their absolute release might be set up as a defense by Wahlig and Mathias, for the reason that the latter would have a remedy over against the former, of which the discharge of the former would deprive them (*Hinkley v. Kreitz, supra*, p. 592). But the release of Wahlig and Mathias could have no such effect even if it were absolute. Arnstein and Goldman could not compel Wahlig and Mathias to pay more than one-half of the judgment, and that amount Hutkoff compelled them to pay, credited the same to Arnstein and Goldman on the judgment, and issued execution against both for the balance only. If Arnstein alone is compelled to pay the whole sum remaining unpaid, he may have contribution against Goldman for one-half the amount so paid, and may recover the balance from his principal, Caroline Pollock. The obligation of the principal to a surety arises not from the signing of the undertaking by the principal, but from the implied agreement to indemnify the surety. There is no averment that Caroline Pollock is insolvent, nor that Goldman is not amply responsible. The appellant has suffered no injury, nor are his rights at all endangered. The order should be affirmed with costs.

BY THE COURT.—SPEIR, J.—The only facts in controversy relate to the assignment of the judgment to Hutkoff. The appellant Arnstein claims that the assignment to him was colorable only—that Goldman furnished the money to keep the judgment alive and to enforce it against Arnstein.

I am of the opinion that the court below justly decided that the weight of evidence sustained the validity of the assignment. The burden was upon the appellant to show affirmatively that the transaction

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Opinion of the Court, by SPEIR, J.

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was collusive. The strength of his application for relief greatly depends upon the allegation of bad faith on the part of his co-defendant and Hutkoff, as his moving papers disclose no defense to the action should he succeed in securing the favor of the court in permitting him to come in and defend. It is not claimed but that he became liable as surety, or that he has paid anything in satisfaction of his liability. Upon the decision of this controverted question of fact, the court on appeal has no ground to interfere.

The question is whether the sureties are liable upon the undertaking upon the appeal from the judgment against Caroline Pollock to the general term of this court. After reciting that she intended to appeal to the general term, the sureties "undertook that the said appellant will pay all costs and damages which may be awarded against her on said appeal, not exceeding five hundred dollars, and also undertook, that if the said judgment so appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the said appellant will pay the amount directed to be paid, &c."

As surety upon this undertaking Arnstein became liable absolutely by the very terms of the undertaking when the judgment below was affirmed by the general term. His papers make the admission that he is liable to the holder of the judgment for the full amount. He may recover the whole amount of any sum, which may be collected of him from his principal Pollock.

The only equities which arise in the case relate to the equitable right of contribution. If he pay more than the proportionate share, he can demand contribution of his co-sureties. Therefore the appellant's position that the release of the sureties on the first undertaking by paying one-half of the judgment operated to dis-

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Opinion of the Court, by SPEIR, J.

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charge the appellant from all liability has no foundation in law.

It was also objected that the undertaking on appeal, not having been in the form prescribed by the code, did not stay the proceedings on the execution, and created no liability, not being supported by the statutory consideration. The omission, upon which the objection is founded, is that of a clause binding the sureties to obey the order of the appellate court. Otherwise the undertaking is regular. The appellant's surety in his oath avers that he executed this undertaking "to stay all proceedings on the said judgment." It was accepted and all proceedings were accordingly stayed. I am inclined to think that it is too late to raise this objection.

It would be grossly unjust to allow the appellant to escape from his obligation, voluntarily given, and which has been accepted and accomplished the purpose for which it was given, on the sole ground of technical defects and informalities which he himself has committed.

The order must be affirmed with costs.

SEDGWICK, J., concurred.

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Statement of the Case.

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JAMES PURSELL, PLAINTIFF AND APPELLANT, v.  
THE NEW YORK LIFE INSURANCE AND  
TRUST COMPANY AND OTHERS, DEFENDANTS AND  
RESPONDENTS.

I. DEMISED PREMISES, ACT FOR THE RECOVERY OF;  
PROCEEDINGS UNDER WHICH ARE DESIGNATED "SUM-  
MARY PROCEEDINGS."

1. RESTORATION OF PREMISES TO LESSEE UNDER CHAP.  
240 (P. 293), OF THE LAWS OF 1842, AFTER DELIVERY  
OF POSSESSION TO THE LANDLORD.

(a) PRE-REQUISITES TO RESTORATION.

1. Payment or tender, within one year after the delivery of possession to the landlord, of all rent in arrear to the time of such payment or tender, and all costs and charges incurred by the landlord, is a pre-requisite.

1. *Tender of the difference* between such arrears of rent, costs, and charges, and either the gross or net profits received by the landlord during the interval, *is not sufficient.*

(b) ACTION FOR RESTORATION.

1. An action against landlord for an account of the rents and profits received by him, and a *restoration or redemption upon payment of the excess* of the rent in arrear, costs and charges over the rent and profits, *cannot be sustained.*

So, also,

2. An action, *founded on an averment that the rents and profits received by the landlord exceeded* the arrears of rent, costs and charges, for an accounting, for judgment against the landlord for the balance found due plaintiff on such accounting, *and for judgment of restoration, can not be sustained.*

II. STATUTES.

1. REPEAL BY IMPLICATION.

- (a) R. S. of N. Y., part 3, chap. 8, title 10, art. 2, § 43, *is not repealed* as to leases having an unexpired term of five years to run, by chap. 240 of the Laws of 1842.

- (b) *Doctrine of repeal by implication considered.*

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Statement of the Case.

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Before CURTIS, Ch. J., SEDGWICK and SPEIR, JJ.

*Decided May 8, 1877.*

An appeal from a judgment entered upon a decision in favor of the defendants, dismissing the complaint with costs.

On March 24, 1868, the defendants leased to the plaintiff the premises on the south-east corner of Broadway and Twenty-second street, in the city of New York, for the term of twenty-one years, which premises the plaintiff sub-let to various tenants. On September 4, 1874, the defendants issued a warrant under dispossession proceedings, for the possession of the premises on three quarterly installments of arrears of rent, and the defendants, the Trust Co. as trustees, and others in their own right, took possession.

The action was commenced April 14, 1875.

The complaint in substance averred the above matters, and in addition thereto, averred :

That the rents of the premises since September 6, 1874, due from plaintiffs, the under-tenants, according to the terms of their several leases, exceeded the amount of rent due from the plaintiff to his landlord at the time of the commencement of this action, together with all costs and charges incurred by said landlord ; that plaintiff had furnished the defendants an account of the rents due, and to grow due, and the interest and the amounts to be credited on account of the rents from the under-tenants ; that the same had been received and retained by the said Trust Company without objection ; and by the said account there is no rent in arrear, but the plaintiff is entitled to the possession of the premises under the statute in such case made and provided, for the unexpired term of the lease under which the plaintiff held the premises exceeded five

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Statement of the Case.

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years at the time of the issuing of the warrant upon said summary proceedings.

That the plaintiff had duly demanded that the premises should be restored to him by the defendants, and that he might hold and enjoy the same according to the terms of the original demise, which the defendants had refused. And prayed that an accounting might be had between the plaintiff and defendants, in respect to the rents heretofore accrued and now due upon the lease made by the defendants to the plaintiff; that the amount of rent due from the tenants might be determined and credited on the amount due; that if, upon such accounting, it should be found that any money was due to the plaintiff by defendants, he might have judgment for such sum, and that he might have judgment restoring the premises to him, and that he should hold and occupy the same, according to the terms of the original demise, and that he might have such other or further relief as to the court shall seem just.

All the defendants answered the complaint.

Both sides adduced evidence on the trial.

On the evidence thus adduced the learned judge before whom the cause was tried, found, among others, the following facts. .

“*Third.* That, in a summary proceeding for the recovery of said premises by the lessors, on account of the non-payment of three quarterly installments of rent, to wit, a principal sum of \$13,743.75, before the Hon. James W. Fowler, justice of the district court in the city of New York for the third judicial district, after a trial on the merits and judgment duly rendered in favor of said lessors on September 1, 1874, on account of the said lessee's default in the payment of said three installments, the said magistrate duly issued his warrant for the removal of all persons from said premises, and to put said lessors in full possession thereof.

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Statement of the Case.

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“*Fourth.* That on September 4, 1874, the said warrant was duly executed, and by virtue thereof the said lessors, the defendants, were placed in full possession of said premises.

“*Fifth.* That on April 14, 1875, the date of the first service of any of the defendants in this action, the amount of rent which would be in arrear as by the terms of said lease, was five quarterly installments of \$4,581.25, making a principal sum of \$22,906.25 ; and, on September 5, 1875 (to wit, one year from the date of the execution of said warrant), seven quarterly installments, making a principal sum of \$32,068.75 ; and, on the trial of this action, eight quarterly installments, making a principal sum of \$38,650 ; and that the gross sum of rents and profits received by the defendants from the said premises, from the date of the execution of said warrant up to the said April 13, 1875, was \$12,808.31, and the net rents and profits, \$12,030.33 ; and, on the said September 5, 1875, the said gross sum was \$18,658.28, and the net sum \$17,394.14 ; and, on the trial of this action, the said gross sum was \$25,791.59, and the net sum \$24,123.22.

“*Twelfth.* That at no time since the execution of said warrant, and before the commencement of this action, or since, did the plaintiff pay or tender to the defendants, their representatives or attorneys, or any of them, or to the said magistrate, the amount of rent in arrear, and the costs and charges incurred by the landlords, or any portion of either of said sums, and that the plaintiff made no tender whatever, excepting of the said account.”

On the findings, judgment was entered, whereby it was “ordered, adjudged and decreed that the plaintiff has not redeemed the premises described in the complaint, and is not entitled to the possession of the same, and that the defendants are rightfully in possession thereof.”

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Statement of the Case.

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And also adjudging that certain defendants recover certain sums for costs and disbursements.

From this judgment the present appeal is taken by plaintiff.

At special term the following opinion was delivered.

SANFORD, J.—The plaintiff, tenant under a lease from defendants and holding over after default in the payment of rent, was dispossessed of the demised premises, on September 4, 1874, by virtue of a warrant issued under the act authorizing “summary proceedings to recover the possession of land” (2 R. S. 515, § 39). The warrant was duly executed, and the landlords, defendants in this action, were on that day put into full possession. The act (section 43) declares that “whenever a warrant shall be issued as aforesaid,” “the contract or agreement for the use of the premises, if any such exists, and the relation of landlord and tenant between the parties, shall be deemed to be canceled and annulled.” It was held, in *Hinsdale v. White* (6 Hill, 507) that this provision annuls the lease from the time of the default for which the warrant issues. The lessor, as owner of the reversion, on resuming possession, is in as of his former estate, and the lessee becomes absolutely divested of all estate in the land. But in this case, inasmuch as the unexpired term of the lease under which the premises were held, exceeded five years at the time of issuing such warrant, the plaintiff, by virtue of chapter 240 of the Laws of 1853, still has the option and privilege, at any time within one year after his eviction, of paying or tendering to the lessors, their representatives or attorney, or to the officer who issued the warrant, all rent in arrear to the time of such payment or tender, and all costs and charges incurred by the landlords, and in such case, of having the premises restored to him, and *thereafter* holding and enjoying the same, without any new lease thereof, according to the terms of the original de-

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Statement of the Case.

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mise. I do not regard this provision as a repeal of section 43, above referred to.

Its effect is rather, upon compliance with the condition, to create anew a relation of the same character with that which was canceled and annulled, and to effect a demise, by operation of law, commencing from the date of such compliance, and continuing thereafter, during the term, and upon the same conditions as prescribed by the original lease. It is not claimed or pretended that payment or tender was ever made by the plaintiff to the defendants, or their attorney, or to the officer who issued the warrant; but in April, 1875, the plaintiff commenced this action, in the nature of a suit in equity, alleging, among other things, in his complaint, that on the first day of May, 1874, and thereafter until the present time, the premises were occupied by sub-tenants of his, who had severally agreed to pay rent therefor to him, that such rent due from such sub-tenants exceeded the amount of rent due from him to the defendants, with all costs and charges incurred by them; that on March 8, 1875, he demanded of defendants an account showing the rents collected by them, and the amount due to them from himself; that such demand was not complied with; that he thereupon tendered to them an account showing that upon crediting him with the rents payable by such sub-tenants, no rent due from himself remained in arrear; that such account was received and retained by defendants without objection; that he is therefore entitled to possession, and has demanded that the premises be restored to him.

The complaint concludes with a prayer for the restoration of the premises, for an accounting with respect to such rents, and for a money judgment for such sum as, upon such accounting, shall be found due and payable to him.

The novel and ingenious theory upon which this

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Statement of the Case.

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action proceeds, involves the proposition that when the legislature, in clear and precise terms, singularly free from ambiguity or uncertainty, has prescribed conditions upon which an estate may vest, a court of equity, in the absence even of an attempt at compliance, and without so much as an offer to comply, or the suggestion of an excuse for the omission, may accept something else in lieu of the condition imposed,—the commencement of a chancery suit, for instance, of indefinite duration and doubtful result,—as an equivalent substitute for an immediate money payment; and, by the inherent authority of its own arbitrary decree, may declare the estate vested, thus overriding the manifest purpose and intent, as well as the literal requirements of the statute. A somewhat similar view of the province and the scope of equity jurisdiction was suggested to this court in the case of *Durgan v. Hogan* (1 *Bosw.* 645), but was promptly and decisively repudiated, in terms which I have, to some extent, adopted.

It is possible, that after the fulfillment of the statutory requirement and the establishment of plaintiff's rights by actual payment and acceptance of the rent in arrear, an equity may arise which will entitle him to an accounting (*Crawford v. Waters*, 46 *How. Pr.* 210); but I am wholly unable to discover such equity in the allegations of the complaint in this cause, or in the proofs adduced at the trial.

Upon the trial it appeared that upon the execution of the warrant, every sub-tenant of the plaintiff was, in point of fact, removed from the premises, and that new agreements were thereupon entered into between the defendants and each of such sub-tenants with respect to the future occupancy of their several tenements. Can it be seriously maintained that the landlords were under an obligation to the plaintiff to retain such sub-tenants for a year, or that, after having been removed, they, or either of them, were under the slight-



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Statement of the Case.

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est obligation to any one to return? It is contended on behalf of the plaintiff, that during the year the estate and possession of the landlords were closely analogous to those of a mortgagee in possession, and that they held the lands *in trust* for their evicted tenant. There is at least this distinction in the two relations; that the mortgagor is still liable for the mortgage debt and accruing interest, notwithstanding that possession is in the mortgagee; while the evicted tenant, with his lease canceled and annulled, is burthened with no covenant to pay rent, and, indeed, is under no liability whatever. If the analogy hold good in respect of the results deducible from it, he may idly fold his hands, and speculate upon the diligence of his trustee, reaping a rich reward therefrom, if the season prove prosperous, and the harvest be abundant, but turning on his heel if the crop should chance to fail.

It further appeared on the trial that the alleged account rendered by plaintiff, made up in manner and form as stated in the complaint, was never accepted or acquiesced in, but, on the contrary, was disapproved and disavowed; and that the net income actually realized by the defendants fell short of the plaintiff's rent in arrear; that no such laches in the care and management of the property was shown as would entitle plaintiff to charge defendant with a rental in excess of their actual receipts, much less with a rental equivalent to that for which his sub-tenants would have been liable to him but for his default and eviction, even were the defendants accountable to him, upon principles applicable to the case of a mortgagee in possession.

But I am of opinion that the act of 1842 (4 *Edm. Stat. at L.* 661), was correctly construed by Judge INGRAHAM, in the case of *Waters v. Crawford*, and by Judge FANCHER in another suit between the same parties, cited above, and entitled *Crawford v. Waters* (the latter case reported in 46 *How. Pr.* 210). In the case



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first cited, Judge INGRAHAM held that "the lessee must tender all rent in arrear at the time of such payment or tender." "There is nothing," he says, "in the statute which provides for the reduction of the rent in arrear by crediting rents subsequently collected by the owner. What may be the liability of the landlord to account to the lessee after he regains the possession is not necessary now to be decided ; but it is not provided in this statute that any such credit should be given before the lessee obtains the restoration of the lease.

"The provision which allows the tender to be made to the officer who issued the warrant, as well as to the parties, shows, that it was not intended that any inquiry should be made as to these credits. He could know from the lease the rent in arrear, and also the amount of costs on the proceedings before him. That he was authorized to receive, but he could not ascertain the amount of rent collected afterwards or the necessary amount of repairs." It may be added, in this connection, that the tender or payment authorized to be made to the lessor, his representatives or attorney, is one and the same.

Whatever ground there may have been, in the case cited, for relieving the plaintiff therein from the legal consequences of his omission to comply strictly and literally with the requirements of the act,—for it would seem from the report of this case on appeal (*Waters v. Crawford*, 2 *Supreme Ct. R.* [T. & C.] 602), that the supreme court in the second department, after a transfer of the case thither in consequence of a division of opinion on the part of the court here, came to the conclusion that he might be relieved,—no ground is suggested for an equitable interference of like character in the case now under consideration. There *performance was in good faith attempted*, and there was in reality a partial performance of the statutory condition.

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Statement of the Case.

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Here the obligation to perform is denied and repudiated.

The plaintiff, in effect, refuses to perform.

The principle upon which courts of equity interfere to prevent or to relieve from forfeitures threatened or incurred, in cases of fraud, accident, mistake, surprise, or even of excusable neglect, where compensation can be awarded, is familiar.

That principle was recognized and acted upon by this court in *Garner v. Hannah* (6 *Duer*, 262), and in *Giles v. Austin* (38 *N. Y. Superior Ct. R.* 215, 235). In *Haywood v. Angell* (1 *Vern.* 233), the lord keeper said that "in all cases where the matter lies in compensation, be the condition precedent or subsequent, there ought to be relief." An important difference, however, in this respect between the breach of a precedent and that of a subsequent condition exists, and was very clearly pointed out by Judge CADWALLADER, of the United States circuit court, in the recent case of *Bird v. The Penn Mutual Life Ins. Co.* (*Legal Intelligencer*, Feb. 11, 1876).

"In the latter case," he observes, viz., in that of the breach of a condition subsequent, "relief may be given where compensation can be made, although the non-performance of the condition has occurred through mere negligence, *unless it has been willful or perverse neglect.*"

"But a court of equity does not in any case relieve against losses consequent at law upon the non-performance of a condition precedent, where such non-performance occurs through neglect alone."

(See also Sugden on the Law of Property as administered by the H. of L. 556-579).

But upon this principle, it is difficult to perceive what relief can be afforded to the plaintiff, who has deliberately elected not to perform the condition upon performance whereof alone his restoration to his former

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Respondent's points.

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rights was made by statute to depend. He disclaims the obligation to perform, and insists upon a supposititious substitute for performance wholly unwarranted by the statute.

His attitude is not that of a suppliant for the equitable interposition of the court to relieve from a forfeiture upon an offer of full compensation, but rather that of an injured suitor claiming as matter of right a judgment of the court, enlarging and extending the operation of a remedial statute, of whose liberal and beneficent provisions he has willfully refused to avail. I am not aware of any principle upon which such an exercise of equitable jurisdiction can be invoked or sustained.

Judgment must be rendered in favor of the defendants, with costs.

*Arnoux, Ritch & Woodford*, attorneys, and *William Henry Arnoux*, of counsel for appellant, in an elaborate brief, urged :—(1) That § 43 of art. 2, title 10, chap. 8, part 3, R. S. was, so far as leases were concerned, having five years to run, repealed by chap. 240 of Laws of 1842. (2) That as a consequence, the possession of the landlord during the year was for the benefit of the tenant, and that he held in the character of a trustee. (3) That, consequently, the doctrines which obtained between a mortgagor and mortgagee in possession, a bailor and bailee, an owner and his creditor in possession under the English writ of *elegit*, applied to this case.

*Van Winkle, Candler & Jay*, attorneys, and *Edgar S. Winkle*, of counsel for respondents, Susan N. D'Hauteville as administrator, and Susan W. D'Au-terville in her own right, and *Betts & Robinson*, attorney, and *N. J. Morris*, of counsel, for the N. Y. Life Insurance & Trust Co., in a well considered brief

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Opinion of the Court, by SPEIR, J.

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combated the propositions contended for by appellant's counsel.

BY THE COURT.—SPEIR, J.—The defendants, the Trust Co. as trustees, and the others in their own right, took possession of the premises upon the plaintiff being evicted under the summary proceedings, and he brought his action in the nature of a suit in equity within the year for restoration, under the statute of 1842. In it he claims an accounting in respect to the rents which he alleges theretofore accrued and became due on the lease, and the rents received subsequent to the eviction from the sub-tenants, and prays that the same may be determined, and credited to the amount due to the defendants; and if, upon such accounting, it shall be found that any moneys are due to the plaintiff by defendants, he may have judgment for such sum, and judgment restoring the premises to him, to be occupied according to the original demise.

To sustain this action, proof should be made that the plaintiff has complied with the requirements of the statute upon which he relies for the restoration of the premises to him as lessee. Within one year after the delivery of possession to the landlord, he must pay, or tender to the lessor, his representatives or attorney, or to the officer who issued the warrant, all rent in arrear to the time of such payment or tender; and all costs and charges incurred by the landlord.

The defendants moved upon the plaintiff's case to dismiss the complaint, which was denied. An accounting was then had on the trial, and the court found that no such payment or tender of rent in arrear, costs and charges were made either to the defendants, their representatives or attorneys, or to the magistrate who issued the warrant, and no tender of anything, excepting tender of a certain account.

This account was constructed by charging the de-

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Opinion of the Court, by SPEER, J.

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fendants with certain amounts which had been provided in a contract between the plaintiff and one William Stuart, whereby the plaintiff was to build a certain theatre, and lease the same to Stuart, though Stuart had never paid the plaintiff any amount whatever; but had sued the plaintiff for damages for breach of this contract to build and lease. It cannot be claimed that these moneys received by the owner in his own right from other parties can form any part of the rent due to the evicted lessee on his lease. Nor can the evicted lessee make tender by including in the sum offered, any amount received by the owners above supposed expenditures.

The statute under which the eviction was had provides that upon the issuing of the warrant, the contract or agreement for the use of the premises, if any such exist, and the relation of landlord and tenant, between the parties, shall be deemed to be canceled and annulled. The language of both statutes is too plain for either interpretation or construction. The words embody a precise and definite meaning apparent upon the face of the statutes. Moreover the question has been determined in a judicial way, and the parties and their proofs have been heard, and their rights settled by a judicial determination. When this has been done, the determination is conclusive upon the parties until reversed, vacated, or set aside in the form prescribed by law. This is a principle of universal application, and results from the judgment of dispossession in the summary proceedings. It extends alike to the decisions of the highest court, and the humblest officer of the State entrusted with the exercise of judicial powers (*White v. Coatesworth*, 6 *N. Y.* 143). The effect of the judgment and its execution therefore is that the lessee is divested of all right to and control over the property, and the owners are in possession as of their former estate, as owners of the reversion. While the lease re-

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mains canceled, the lessee has no right to the possession of the premises, and no right of action in relation to them until he shall have established such right by payment or tender as prescribed by statute.

The plaintiff claims to be released from this duty and obligation, imposed by the statute, of payment or tender, on the ground that the latter statute of 1842 repealed the prior statute, which declares that whenever a warrant shall be issued in a summary proceeding, "the contract or agreement for the use of the premises and the relation of landlord and tenant shall be deemed canceled and annulled," so far as it applies to leases having an unexpired term of five years at the time the warrant issued.

The repeal of this part of the statute is made the basis of the counsel's argument in support of his views of the law of the case.

It was doubtless the intention of the legislature in passing the statute to relieve the tenant from the harsh severity of the law of 1820.

Leases having more than five years to run might become and frequently were generally very valuable, owing to the increased value of the land and improvements made in contemplation of the enjoyment of a long term. In case the tenant became unfortunate and failed to pay an installment of rent while in possession during the first five years of the demised premises, the dispossession was supposed to work a very considerable hardship.

The question therefore is one of *intent* in framing the statute.

Ordinarily express language is used where a repeal is intended, and a repeal by implication is not favored. In *Bower v. Lease* (5 *Hill*, 225), NELSON, Ch. J., said, "The invariable rule of construction in respect to the repealing of statutes by implication is, that the earliest act remains in force, unless the two are manifestly in-

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Opinion of the Court, by SPEIR, J.

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consistent with and repugnant to each other; or unless in the latest act some express notice is taken of the former, plainly indicating an intention to abrogate it.”

The reason of the rule is that when the mind of the legislature has considered the object and details of the subject of the statute, and not in express language contradicting the original act, the latter act shall not be considered as intended to affect the previous provisions of the former, unless it is absolutely necessary to give the latter act such a construction as that its words shall have any meaning at all.

It appears that the mind of the legislature was pointedly turned to the *intention* it had in view in framing this act of 1842.

The legislature therefore repealed an amended act, passed April 25, 1840—being an amendment to subdivision 2 of section 38 of chapter 8 of title 10 of the third part of the Revised Statutes. The amended act which was repealed was to the effect that subdivision 2 should not be construed to apply to any lease, the unexpired term of which should not exceed five years. The attention of the legislature was therefore called to the necessity of repealing *so much* of the act authorizing summary proceedings as regarded leases exceeding the term of five years; and it follows that in its judgment *no further repeal* was necessary. The right of payment or tender is not alone limited to the tenant. Provision is made for the mortgagee and judgment creditor, either of whom may pay the rent in arrear. This right they get in the same way as the tenant—by the force and sanction of the statute. The statute itself cancels the lease upon eviction, and the lessee has no right of action while the lease remains canceled.

Payment or tender of the rent in arrear must be the first step taken towards restoration, and until that be done no right of action accrues. The lessee has no standing in court, as against the owner, in respect to



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the premises, until he establishes such right as prescribed by statute, by making payment or tender.

He has therefore, no right to an accounting of the profits received by the owner under the statute, and if not under the statute, he cannot have it in equity. If the law commands or prohibits a thing to be done, equity cannot enjoin the contrary, or dispense with the obligation.

The general term of the supreme court, in *Waters v. Crawford*, 2 *T. & C.* 602, decided that under the prayer for general relief, the plaintiff was entitled to an accounting. The decision was put upon the ground that the prayer for general relief was equivalent to a special prayer for redemption.

The special term had decided that the plaintiff was not entitled to an account, and I think in that case, the general term rightly held that was error. The accounting might have presented such a case as would have entitled the lessee to redeem under the statute. That was quite unlike the present case. There was a partial performance of the statutory condition to make payment or tender, and the plaintiff in good faith undertook to perform, but misapprehended the construction of the statute.

Here, although no attempt to perform the statutory requirement was made, the court allowed the accounting to take place, and upon the facts ascertained held that the plaintiff had no case.

The judgment of the special term must be affirmed with costs.

CURTIS, Ch. J., and SEDGWICK, J., concurred.



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Statement of the Case.

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ELIJAH DOANE AND ANOTHER, PLAINTIFFS AND  
APPELLANTS, v. WILLIAM LINDSAY, ASSIGNEE,  
DEFENDANT AND RESPONDENT.

I. *PARTNERSHIP.*

1. ATTACHMENT ISSUED, IN AN ACTION AGAINST CO-  
PARTNERS UPON A FIRM DEBT, AGAINST ONE OF THE  
FIRM.

(a) WHAT CAN BE SEIZED UNDER.

1. Only the right and interest of the partner against whom the attachment issued, in the partnership goods; which is the surplus remaining after the partnership debts have been paid.

(b) AGREEMENT BETWEEN ATTACHING CREDITOR AND SUBSE-  
QUENT ASSIGNEE OF THE FIRM, whereby in substance the  
assignee was to sell the attached goods; and the applica-  
bility of the proceeds to be determined by the court or  
otherwise, as the parties might agree.

1. *Effect of.* It places the attaching creditor in the posi-  
tion of a purchaser of the attached interest at a sheriff's  
sale thereof.

HELD—

it appearing on the trial of an action brought by the  
attaching creditor, based on such agreement, that at  
the time of the levy of the attachment the firm was in-  
solvent, that no part of the proceeds was applicable on  
the judgment obtained in the action in which the at-  
tachment issued, and therefore the complaint was prop-  
erly dismissed.

Before CURTIS, Ch. J., and SPEIR, J.

*Decided May 8, 1877.*

Appeal from a judgment in defendant's favor, en-  
tered upon findings of fact and law, made by the judge  
who held the court at special term, before which it  
came and was tried without a jury.

On December 21, 1875, the plaintiffs were copart-

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Statement of the Case.

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ners doing business under the firm-name of Doane & Gott, and on the same day John Winans and Jared Flagg were copartners doing business in the same city under the firm-name of John Winans & Company. On that day said firm of John Winans & Company were indebted to the plaintiffs in the sum of \$864.10 with interest thereon, for goods sold and delivered to them by plaintiffs herein; and on said day and for a long time prior thereto the said Winans was, and had been a non-resident of the State of New York, but said Flagg was a resident of the city of New York. On said day plaintiffs commenced an action in the supreme court of the State of New York, against said Winans and Flagg as such copartners to recover said sum of \$864.10 for goods sold and delivered them as aforesaid by said plaintiffs, and on said day obtained a warrant of attachment directed to the sheriff of the city and county of New York, and commanding him "to attach and safely keep all the property of the said defendant Winans within your county or so much thereof as may be sufficient to satisfy the plaintiffs' claim of \$864.10 with interest as aforesaid, together with the cost and expenses."

By virtue of said warrant said sheriff on said day took into his possession under said attachment a large amount of merchandise, being of the value of \$2,000 and upwards, and being all the stock in trade of said John Winans & Company. Said Winans and Flagg were partners and owners of said stock in trade, and Winans had at least a half interest therein.

The summons and complaint in said action were served simultaneously with the levy under said attachment on both of said defendants. On the same day, but several hours after said levy, and before any judgment was entered in said action, said firm of John Winans & Company made a general assignment of their property for the benefit of their creditors, to the

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defendant in this action. Such proceedings were had in said action, that judgment for failure to answer was duly entered in favor of the plaintiffs and against said Winans and Flagg, on January 11, 1876, for \$965.56.

On December 31, 1875, the parties to this action made and entered into the following agreement in the action in which the attachment issued.

“N. Y. SUPREME COURT.

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“It is hereby agreed that the assignee of the above-named defendants may sell the attached property herein, and that he retain in his hands the proceeds of such sales, such proceeds to take the place of such attached property and to be applicable to the payment of the plaintiffs' claim in this action, if the court shall so order; and shall in all respects be applicable to the same extent as the property if unsold would be applicable to the payment of any judgment recovered by the plaintiffs herein. The question of such applicability to be hereafter determined by the court or otherwise, as may be agreed upon by the respective parties hereto; and said assignee hereby agrees to hold said proceeds to be disposed of as aforesaid; and it is further agreed that any goods in the hands of said assignee which were consigned to defendants by plaintiffs, be sold in the same manner and the proceeds be held subject to such further order and determination as may be had in the premises by the respective parties hereto, and said assignee hereby agrees to hold said proceeds and the proceeds of any of said consigned

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Appellant's points.

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goods which have heretofore been sold subject to such order or determination.

“Dated, December 31st, 1875.

[Sd.] WILLIAM LINDSAY, Assignee,

[Sd.] ISAAC L. MILLER, Pl'ffs Atty.”

The defendant herein in pursuance of said agreement sold said attached property, from which he received and now holds in accordance with said agreement the sum of \$2,200.

It was admitted that the debts of the firm at the time of the attachment were about \$3,000.

The judgment appealed from is based on the above agreement.

*Isaac L. Miller*, attorney, and of counsel, for appellants, urged :—I. The sheriff was not only justified, but it was his duty to take manual possession of the copartnership property under the attachment, and the defendant in this action, as assignee, could not have retaken the same by replevin (*Smith v. Orser*, 42 *N. Y.* 132 ; *S. C.*, 43 *Barb.* 187 ; *Goll v. Hinton*, 8 *Abb. Pr.* 120, and cases there cited). The court will observe that these decisions are in actions brought against one or more members of a partnership by private creditors, and not on a copartnership indebtedness ; while the original action brought by plaintiffs, and in which the attachment was issued, was a suit against all the members of a copartnership, and on a copartnership indebtedness.

II. The possession of the sheriff being lawful, the plaintiffs, by virtue of the levy under said attachment, ceased to be creditors at large of said firm of John Winans & Co., but became creditors, having a specific lien on the goods and chattels attached (*Richney v. Stryker*, 31 *N. Y.* [4 *Tiff.*] 140 ; *Frost v. Mott*, 34 *Id.* [7 *Tiff.*] 253 ; *Heye v. Bolls*, 2 *Daly*, 231).

III. It having thus been demonstrated, (a) That the

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Appellants' points.

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sheriff was lawfully in possession of the property attached; (b) that, by virtue of the levy, plaintiffs ceased to be creditors at large, and became creditors having a specific lien on the property thus attached; we come to the real questions at issue, viz: 1. Is the interest of a member of a partnership in partnership effects, property capable of being attached? 2. If such interest is attachable, what rights, if any, did plaintiffs acquire by virtue of said levy, under the attachment? (Winans had, at least, one-half interest in the partnership stock in trade seized under the attachment.) 1. The interest of a partner is "property" capable of attachment (*McKay v. Harrower*, 27 *Barb.* 463; approved in *Smith v. Orser*, *supra*). Partners are joint tenants in the stock and all the effects. They are seized *per mi et per tout* (*Phillips v. Cook*, 24 *Wend.* 389, 393, cited and approved *Smith v. Orser*, *supra*; *Mabbett v. White*, 12 *N. Y.* [2 *Ker.*] 442, 454, 455; *Wells v. March*, 30 *N. Y.* 344, 350; *Baldwin v. Tynes*, 19 *Abb. Pr.* 32). The corpus of the effects is partnership property (*Menagh v. Whitwell*, 52 *N. Y.* 146, 158; *Parsons on Partn.* 150; *Brinkerhoff v. Marvin*, 5 *Johns. Ch.* 320, 328; *Berry v. Kelly*, 4 *Rob.* 106, 125). These decisions appear to establish beyond all controversy that a partner's interest in partnership effects is property, and the conclusion seems to follow naturally and inevitably that as such it can be taken under attachment and held to await the final decision of the case. 2. As to the right acquired by plaintiffs by the levy made under the attachment. It being admitted, that the defendant, as assignee, has in his possession \$2,200 proceeds realized from the sale of the attached property, and that said Winans was interested in said property to at least the extent of one-half, and as plaintiffs are fully protected by the stipulation, it seems to be perfectly obvious in the light of the decisions under subdivision one of this point, that plaintiffs are entitled

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Appellants' points.

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to judgment against defendant as such assignee to the full extent of their claim with costs. But at this stage of the case plaintiffs are met with the following objections, viz., a partner is interested only in the surplus remaining after the payment of the firm indebtedness; that plaintiffs could only attach that interest; that Winans & Co. were insolvent, therefore nothing could remain after payment of firm indebtedness, and that, therefore, plaintiffs attached nothing, and the following cases are cited in support of this theory (*In re Smith*, 16 *John.* 126; *Allen on Shff.* [Ed.] 1845, 154). *In re Smith* may be considered as overruled by *Smith v. Orser*, *supra*, see opinion of LOTT, J. With reference to this objection it should be noticed that the authorities holding the interest of a member of a partnership in partnership effects to consist merely in the surplus remaining after the debts of the firm have been paid, will be found to be at the suit of a *private* creditor (3 *K. C.* 78, note *b*, 11th Ed.; *Menagh v. Whitwell*, *Smith v. Orser*, *Goll v. Hinton*, *supra*). By a critical examination of the opinion of RAPALLO, J., in *Menagh v. Whitwell*, it will be seen that though he appears to state this rule more broadly (see p. 158), yet in reality he refers to actions brought by *private* creditors of one or more members of the copartnership or by parties claiming under one or more. The reason of this rule is twofold: 1. For the protection of copartnership creditors, *i. e.*, partnership debts have in equity an inherent priority of claim to be discharged from partnership property (*Menagh v. Whitwell*, *supra*). 2. For the protection of the other members of the copartnership, *i. e.*, in order that partnership assets may not be used in the liquidation of private indebtedness of one partner to the prejudice of the remaining copartner.

IV. This case was dismissed. The court following "with some doubt" *Berry v. Kelly*, *supra*. The

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court in that case did not and could not hold as stated in the special term opinion rendered in this case, that "an attachment by a firm creditor of the goods of one of the firm, in an action against the firm, on a firm indebtedness, did not enable the sheriff to levy on a greater quantum of interest in firm property than if the plaintiff was a creditor of the defendant in the attachment individually," for the following reasons: 1. Said firm of Carroll & Mead was insolvent and unable to pay its debts. 2. That being the case, if plaintiffs occupied no better position than individual creditors of the non-resident defendants, against whom the attachment was issued, they only attached the interest that said non-resident defendants had in the surplus remaining after the payment of the partnership indebtedness (*Menagh v. Whitwell*, *Smith v. Orser*, *supra*), and the partnership being insolvent, there would be no surplus or interest therein remaining, consequently nothing attachable. 3. The sale, therefore, to Berry would have transferred all the right, title and interest of the partnership to the goods so sold, and the plaintiff Berry would have been entitled to recover against the sheriff, not one-third of what the said attached goods were worth, but the full value thereof, which was not pretended. The court in *Berry v. Kelly* did state that the individual partner's right to appropriate partnership property to pay partnership debts could not be levied on by attachment. It not being property in any sense of the word, but a mere incident upon the relation of partnership. It is assumed that by the phrase, "right of appropriation," the court meant that the only interest that each partner had in partnership effects was the right to use or "appropriate" the same in liquidation of partnership debts. Plaintiffs attack this proposition on the following grounds: 1. The court at special term proceeded upon the theory that the plaintiffs in the attachment suit

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Appellants' points.

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acquired certain rights under and by virtue of the levy under said attachment, and awarded damages against the sheriff. The general term affirmed the judgment against the sheriff, upon the theory that the sheriff had no right to sell the *whole* of the attached property. Having thus decided, the case was disposed of, and the remarks as to the "right of appropriation," and as to such right not being attachable and not being property, are not only *dicta*, but are in conflict with the decision, for as before shown if the non-resident partners' interest was not attachable, plaintiff was damaged not only to the extent of one-third, but to the full value of the property, and he, having appealed, should have been awarded a new trial in order to give him an opportunity of proving damage. 2. Said proposition is also in conflict with that portion of the opinion on page 125, holding that whatever may be the state of the partnership accounts, whatever may be the state of the firm as to solvency, each partner has a *property* and interest in the partnership assets, coequal to his share in the firm; and also on page 128, holding that the plaintiff buying the goods subject to the attachment on the shares of the two partners, his right, therefore, was subordinate to that of the sheriff. Plaintiffs submit, that, if the non-resident partners had but the "right of appropriation, which right is not property, being only an incident and not attachable," then the plaintiff Berry did *not* buy the goods subject to any lien thereon, by virtue of the levy under the attachment, and that his rights were not only prior to those of the sheriff, but that the sheriff himself was technically a trespasser, there being no "property" that he could levy on by virtue of the attachment. 3. Plaintiffs insist that as matter of law so much of said opinion as speaks of the interest of a partner in partnership effects as a "right of appropriation," as a "mere incident of the partnership," as



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Respondent's points.

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"not being property in any sense of the word," is unsound and in conflict with the well settled law of this State, partners being seized *per mi et per tout*, and without further amplifying this point, refer to the authorities cited under the third point.

V. Plaintiffs claim that by virtue of the attachment they acquired a lien on the interest of John Winans in the stock in the trade belonging to the firm of John Winans & Co. That said interest was at least one-half the value thereof. That plaintiffs are fully protected by the stipulation made by the assignee. That said assignee holds the proceeds realized from the sale of said stock subject to the rights of plaintiffs herein, and that the claim of the plaintiffs should be satisfied therefrom.

*John L. Lindsay*, of counsel, for respondent, urged:—I. The interest of Winans alone in the firm assets was attached, and only his individual interest could be attached; his interest was what was left over after the firm's debts were paid (*Berry v. Kelly*, 4 *Rob.* 113; *Smith v. Orser*, 42 *N. Y.* 132; *Goll v. Hunton*, 8 *Abb. Pr.* 120). He had no interest liable to attachment; for the debts of the firm at the time of the attachment greatly exceeded the value of the firm's assets; the debts being \$12,000, and the firm assets only \$3,000. The general assignment followed the attachment and preceded the judgment. Upon the assignment the firm property became vested in the assignee, and could not be levied upon under the execution against the property of the debtors. Had the sheriff under the execution sold to a stranger the interest of Winans, the purchaser would be entitled simply to an accounting and to such an amount as Winans would be entitled to after the firm debts were paid (*Berry v. Kelly*, *Smith v. Orser*, *supra*). The judgment should be affirmed.

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Opinion of the Court, by SPEIR, J.

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BY THE COURT.—SPEIR, J.—The question presented is, what title or interest superior to that of the assignee, the plaintiffs had in the goods sold under the agreement.

It is obvious, that whatever title or interest they had resulted from the levy of the attachment. We must, therefore, see what title or interest that levy gave.

In *Berry v. Kelly* (4 *Rob.* 106), it is determined that under an attachment issued under like circumstances, only the right and interest of the partner, against whom it was issued, in the partnership goods could be attached. That right and interest is the surplus remaining after the partnership debts have been paid.

If, under an execution issued by plaintiffs upon a judgment obtained by them in the action in which the attachment issued, the sheriff had sold the right and interest of the partner against whom the attachment issued, in the partnership property (his interest in which was seized under the attachment), then as to the plaintiffs the sum for which such right and interest was sold would represent the value thereof and be applicable on their judgment; but as to the purchaser such sum might well not represent the value of such interest. Its value to the purchaser would depend upon the state of the partnership affairs; if the firm was insolvent its value would be nothing, and it would increase in value in proportion as the affairs of the firm approached to solvency.

In this case there has been no sale under execution in consequence of the agreement between the plaintiffs and the assignee of the firm. The substantial effect of that agreement is to place plaintiffs in the position of purchasers, for a nominal sum, of the right and interest of the partner against whom the attachment issued. It follows that the actual value of that right and

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interest, as dependent on the condition of the partnership affairs, is the measure of their interest in the goods themselves and in the proceeds thereof arising from the sale by the assignee.

It appeared on the trial, that the firm were largely insolvent, its indebtedness being \$12,000, while its total assets were only \$3,000.

The interest of the partner against whom the attachment issued in the goods, his interest wherein was wholly valueless, and, in fact, nothing.

No right or interest in the goods was therefore seized under the attachment, and consequently plaintiffs have no interest in and are not entitled to any portion of the goods. It results that the complaint was properly dismissed.

Judgment affirmed, with costs.

CURTIS, Ch. J., concurred.

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EMMA K. RITZLER, PLAINTIFF AND RESPONDENT, v.  
THE WORLD MUTUAL LIFE INSURANCE COM-  
PANY, DEFENDANTS AND APPELLANTS.

LIFE INSURANCE.

POLICY. — APPLICATION.

*Effect of making the latter a part of the contract, and by the terms of the policy, contracting that the statements in the application are true, and if not true, the policy void, &c.*

If a person contracting for life insurance make the payment of the policy conditional upon the absolute truth of his answers to questions in the application as to whether he has been afflicted, at any time, by any one of a long catalogue of diseases, he must be bound by it, although it may

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be oftentimes impossible for the applicant to answer correctly.

The courts cannot set aside the conditions of such a contract, although the insured may have inadvertently erred—by failure of memory or otherwise—in an answer to any one of the numerous questions in the application. Foot v. The Etna Life Ins. Co., 61 N. Y. 577.

Before CURTIS, Ch. J., SANFORD and FREEDMAN, JJ.

*Decided May 8, 1877.*

This is an appeal from a judgment entered on a verdict in favor of the plaintiff, and also from an order denying defendant's motion for a new trial, made on the minutes of the court.

This action is brought on a policy of life insurance, for \$1,500, issued by the defendants on the life of plaintiff's husband, John A. Ritzler.

The policy, upon its face, purports to have been issued "in consideration of the representations, declarations and covenants contained in the *application therefor*, to which reference is here made, *as a part of this contract*," and upon the express condition and agreement, "that the statements and declarations made in the application therefor, and on the faith of which it is issued, are in all respects true, without the suppression of any facts relating to the health or circumstances of the insured, affecting the interests of the company;" and that, "in case of the infringement of any of the foregoing conditions, . . . this policy shall become null, void and of no effect."

The application, referred to in the policy, was subscribed by the plaintiff's husband, in her name and on her behalf, as well as by himself, individually. It contains an agreement that "this declaration and the above proposal shall be the basis of the contract" between the parties, and "that, if any fraudulent or untrue

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allegation be contained therein, or in the proposal," the policy shall be void.

The application contains certain "questions to be answered by the person whose life is proposed to be insured,—and which form the basis of the contract."

Among them are the following, with a negative answer appended to each.

"Qu. 12. Has the party ever had any of the following diseases:"—(Here follows a numerous list, including, among others, "rheumatism")—"or any serious disease?" Ans. "No."

If the party has had one or more of these diseases, please state particularly, *which, when, how severe, and whether fully recovered, and answer, no, to all the rest.* Ans. "No."

"Qu. 13. Has the party had inflammatory rheumatism, if so, when and how often?" Ans. "No."

Upon the trial, it appeared in evidence that, in or near the year 1860, Ritzler was sick, for four or five weeks, with acute, febrile or inflammatory rheumatism, or rheumatism of the joints, and was attended during that period, for that disease, by Dr. Bernhardt Segnitz, then his family physician.

The court submitted to the jury the question whether the deceased ever had rheumatism, as testified to by Dr. Segnitz; but charged, in substance, that if, under the circumstances of the case, the jury was satisfied that Ritzler *did not remember* having had rheumatism, when he signed the application,—and therein denied having had it,—if the fact that he had had it, was not then in his mind,—and he gave the answer truthfully and in good faith, the plaintiff would be entitled to their verdict.

He further charged, in substance, that if the jury found that Ritzler had had rheumatism, the burden of proof was upon the plaintiff to satisfy them that he made the answer in good faith, and that unless it was

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proved that he made the answer in good faith, they must find for the defendant.

He further charged, in substance, that no misunderstanding of the question, on Ritzler's part, would avoid the defense, "unless you are satisfied that he did not recollect the fact of having the disease."

The question whether or not he did recollect having had it, was submitted, with the intimation that the plaintiff was entitled to recover, even if, through forgetfulness, the question was answered untruly.

The court refused to charge :—

(1.) That "the truth of the statements in the application, which were in express terms made the basis of the policy, was a condition precedent to the validity of the policy."

(2.) That, if the insured, John A. Ritzler, had had an attack of rheumatism prior to his application for insurance, the plaintiff cannot recover.

(3.) That where the application provides that its statements shall be the basis of the contract, that any untrue or fraudulent answers shall avoid the policy, and the policy makes the application part and parcel of itself, and further, that if, in any respect, untrue or fraudulent, it shall avoid the policy, that the two papers must be construed as one.

(4.) That, whether or not the representations were material, the parties have made them so, and whether innocently made or not, if untrue, they avoid the policy.

Exception was duly taken by the defendants to each and all of the several rulings above set forth.

The jury rendered a verdict in favor of the plaintiff for the amount claimed.

The defendant's motion on the minutes, for a new trial, was thereupon denied.

Judgment was entered upon the verdict, and appeals were taken both from the judgment and from the order denying the motion.

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Opinion of the Court, by SANFORD, J.

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*W. P. Prentice*, for appellant.

*J. H. V. Arnold*, for respondent.

BY THE COURT.—SANFORD, J.—By the express terms of the policy of life insurance upon which this action is brought, the “application” therefor constitutes an essential element in the contract between the parties. The application provides that the declarations and proposals therein expressed shall be the basis of the contract; and the policy recites the declarations, representations and covenants of the application, as the consideration for the promises which it contains. The covenants in the application are, by the express language of the policy, made binding upon the parties, and the policy is, on its face, issued and accepted upon condition that the statements and declarations of the application are, in all respects, true. The two papers are concurrent in date and tenor: they relate to the same subject matter; each has express reference to the other; both are essential to a complete understanding of the purpose and intent which the parties had in view. Under these circumstances, the two instruments are to be regarded as one, and the same construction is to be given to their various provisions, as if they had been all embraced within the scope of a single document subscribed by both the parties. But there is no substantial discrepancy in the language of the two instruments. By the terms of each, the validity of the contract of insurance is made to depend expressly upon the substantial truth of certain statements. The application provides that, if any fraudulent or *untrue* allegation be contained therein, the policy shall be void.

The policy specifies, as one of the conditions upon which it is made and accepted, that the statements and declarations of the application are, *in all respects*, true. It also provides, that an infringement of any of its

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conditions shall render it null, void and of no effect. Such being the agreement between the parties, there would seem to be no room for discussion as to the materiality of the statements which form the basis of the contract, or as to whether or not they were made in good faith, or with intent to deceive. By making certain statements the basis of their contract, and declaring that its validity shall depend upon the truth thereof, the parties stipulate that, for the purposes of the contract, such statements shall be material and that their truth shall be an essential prerequisite to liability thereon, irrespective of the motives or intentions of the party insured. When the validity of the contract of insurance depends, by its terms, upon the truth of a statement, it is wholly unimportant whether the statement is material to the risk or not; and the question whether the party making it erred innocently or otherwise, is not to be considered. This position was, in effect, conceded upon the argument; but it was urged that the peculiar language of this policy, with respect to the suppression of material facts affecting the interests of the company, operated to qualify and restrict the provision by which the validity of the contract was made conditional upon the truth of the express statements contained in the application. It is true that the policy provides not only that the positive statements and representations of the insured shall be, in all respects true,—but also that there shall be no suppression of facts relating to the health or circumstances of the assured and affecting the interests of the company. The condition is, that such statements are in all respects true, without the suppression of material facts not specifically inquired about. In order to vitiate the policy, a *suppressio veri* in regard to a matter not specifically inquired about, must be material and affect the risk; but it by no means follows that a *suggestio falsi*, involved in a



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Opinion of the Court, by SANFORD, J.

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positive declaration made in response to a specific inquiry, must in like manner be of like character, in order to produce the like result. The contract is otherwise. The two provisions are distinct. That with respect to a suppression is intended to be cumulative rather than restrictive. It was inserted *ex abundanti cautela*, and in order to provide for a case, not previously reached or covered. There might well be a suppression of facts affecting the risk, notwithstanding the literal truth of every response to the several inquiries addressed to the applicant. It was, therefore, important to provide that a suppression of material facts, not specifically inquired about, should work the same results as express statements not in all respects true. Hence the condition is to be interpreted not only as forbidding all falsehood, but as exacting the disclosure of truth, in so far as such disclosure may be material.

The supplemental clause enlarges, rather than impairs, the obligations intended to be imposed, and probes the conscience of the applicant by enjoining an honest frankness as well as by prohibiting mendacity.

It was urged that no case could be found in which a policy containing this qualification had been construed as importing a warranty of the truth of representations therein contained irrespective of the question of their materiality and good faith. But, it was said in *Jeffries v. Life Ins. Co.* (22 Wall. 47), that where the stipulation is not expressed to be made as to important or material statements only, the statements need not come up to the degree of warranties; that they need not be representations even, if the idea of an affirmation having any technical character is conveyed by that term. The whole question depends upon the agreement of the parties. And where they have distinctly agreed, their contracts must be performed and enforced. In the case last cited, the language of

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Opinion of the Court, by SANFORD, J.

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the policy was *precisely identical* with that now under consideration, and while it was observed that many cases might be found which held that false answers to inquiries not relating to the risk would not necessarily avoid the policy, unless they influenced the mind of the company, and that their materiality was a question for the jury, yet the court said, "we know of no respectable authority which so holds, where it is expressly covenanted as a condition of liability that the statements and declarations made in the application are true, and when the truth of such statements forms the basis of the contract." The same principle was recognized and affirmed in *Fitch v. American Popular Life Ins. Co.* (59 N. Y. 566), although in that case the policy was construed to import no more than an assurance that the statements in question were made honestly and in good faith, and were believed by the applicant to be correct and true. Stress was laid upon peculiar language tending to show that the true construction of the papers was that the policy should be void only in case of intentional and fraudulent misrepresentation or suppression of facts by the applicant, and particularly upon the terms of a printed "notice to policy holders," attached to the policy, which stated in terms that "*payment would be contested only in case of fraud.*" The more recent case of *Foot v. Aetna Life Ins. Co.* (61 N. Y. 571), holds that statements, which in terms are declared to be "part and parcel of a policy," are warranties, and must be substantially true, or the policy will be void. That where the validity of the policy is made to depend upon the truth, as well as upon the honesty and good faith of such statements, either falsity or fraud will vitiate it, and that it is not essential to this result that both these elements should concur; or, in case of an untrue statement, that it should be knowingly or intentionally, and *mala fide*, made.

This authoritative exposition shows that the charge

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Opinion of the Court, by CURTIS, Ch. J.

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*of the judge*, and his refusals to charge as requested, were erroneous, and require the reversal of the judgment and order appealed from.

They are reversed accordingly, and a new trial is granted, with costs to appellants, to abide the event.

FREEDMAN, J., concurred.

CURTIS, Ch. J.—If persons make the payments of policies upon their lives conditioned on the correctness of their answers as to whether they have at any time had one or more of a long catalogue of diseases, and which it is oftentimes impossible in the nature of things for any one to answer correctly, they must be bound by it. The courts cannot set aside the conditions of this class of contracts when persons choose inconsiderately or ignorantly to enter into them and agree to make them obligatory.

It is a hardship for parties to pay for years, money from their earnings to secure a provision for their families, which may not only be defeated, but also absorb in a fruitless suit what little else they leave, in case the insurance company outlasts the insured, and can show that he has had at any period of his life some illness, the name of which he never knew, or has forgotten, and has thus inadvertently erred in an answer to one of the numerous questions contained in the application.

In the present case, the insured appears to have been an industrious German barber, whose wife insured his life for \$1,500. The defendant claims that there was a breach of warranty in the contract by his having incorrectly stated in the application that he had not had rheumatism. A German physician testified that some thirteen years previous to this application for insurance, he had treated him for rheumatism. This testimony is not very satisfactory and is unsustained

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by any books or memoranda, while it is controverted by his wife, the plaintiff, who had been married to and lived with him for twenty-one years, by his son, and by another witness. It was sufficient, however, to raise a question of fact for the jury, and they could very properly have found upon it in the defendant's favor.

The judge charged, in substance, that this defense would be avoided, if the jury found that at the time of making the application the insured did not remember that he had had the rheumatism, or made the answer in good faith. This instruction to the jury is at variance with the doctrine recently held in the similar case of *Foot v. Ætna Life Ins. Co.* (61 N. Y. 577), and as it is, perhaps, possible that the jury may have been misled by this language of the judge, I must concur in the reversal of the judgment and order appealed from, and the granting of a new trial.

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CARTER, *et al*, PLAINTIFFS AND RESPONDENTS, v.  
DANIEL YOUNGS, DEFENDANT AND APPELLANT.

LIFE ESTATE IN LANDS.

LIFE TENANT, HAVING A FREEHOLD ESTATE IN LANDS.--LESSEE FOR LIFE ON A NOMINAL RENT.

In regard to the payment of taxes and interest on incumbrances, and for necessary repairs, no distinction can be made; each is alike bound in this respect.

In this case, the plaintiffs leased and demised to defendant certain lands and tenements for the term of his (defendant's) natural life, at the annual rent of one dollar, with power to sub-let any part, or all of the same, and to collect the rents during the term. The lease contained no other covenants or conditions, and no re-entry clause.

*Held*, that the defendant was bound to keep down the taxes, and keep the premises in repair, and an order appointing a

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receiver to collect the rents and apply the same to the payment of accrued taxes and necessary repairs, was affirmed.

The obligation of the life tenant does not rest in covenant, express or implied, but in equity, and exists as an incident to the estate; when, therefore, one contracts for a life-estate, he must be supposed to contract with reference to the incidents thereunto attached.

The reservation of rent does not change the nature of the estate, nor create an equity in favor of the tenant for life, paramount to that of the reversioner or remainder-man.

If there be any presumption from such reservation, it is that the amount of rent was fixed with reference to the obligations incident to a life estate, and not superseding or changing them. The tenant for life acquires an estate of freehold *by virtue of the term*, and irrespective of the manner or form in or by which it was created, whether by grant, devise, gift, or purchase, or by operation of law; and a charge upon the estate by way of rent, annuity or otherwise does not affect *the nature of the estate*.

Before CURTIS, Ch. J., SANFORD and FREEDMAN, JJ.

*Decided May 8, 1877.*

Appeal from an order appointing a receiver of the rents and profits of real estate, *pendente lite*.

The plaintiffs leased and demised to the defendant, Daniel S. Youngs, certain lands and premises described in the complaint, for the term of his natural life, at the annual rent of one dollar, with power to sub-let any and all of the buildings thereon, and to collect the rents therefor, during the said term. The lease contained no covenants or conditions, and no re-entry clause.

The complaint avers that the defendant has permitted the taxes upon the said premises to accumulate and remain unpaid, and has also omitted to pay the interest upon a mortgage to which the said premises are subject; that said interest and taxes are rapidly

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Opinion of the Court, by SANFORD, J.

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accumulating; and that, unless provision is made for the payment thereof, out of the rents, the amount in arrear will soon equal the value of the property.

Upon the complaint, duly verified, and supported by an affidavit of one of the plaintiffs, an order was granted requiring the defendant to show cause why a receiver should not be appointed.

On the hearing, affidavits were read in opposition, from which it appeared that the defendant had made certain payments, both of principal and interest, on account of the mortgage mentioned in the complaint, but it was undisputed that the taxes from the date of the demise, in 1873, to the present time, had been allowed to remain unpaid and in arrear.

An order was thereupon made appointing a receiver, with power to collect the rents, *pendente lite*. The order provided that the defendant should be permitted to occupy a house situated upon part of the premises, free of rent, and that the receiver should pay him out of the rents \$200 per month for his support; but that the residue of the accruing rents should be applied by the receiver to the payment of the accrued taxes and necessary repairs.

From this order, the present appeal is taken.

*Luther R. Marsh*, for appellant.

*George W. Lord*, for respondent.

BY THE COURT.—SANFORD, J.—The general equitable principle which apportions the charges upon real estate ratably, between owners entitled in possession, and as reversioners or remainder-men, is not disputed. It is, however, contended that the principle is inapplicable in the case of a lease whereby rent is reserved. A distinction is attempted to be drawn between a life tenant, having a freehold estate, and a mere lessee for

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Opinion of the Court, by SANFORD, J.

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life, on rent, who, it is said, has no part of the ownership, but simply a right of possession. It is urged that the reason why a tenant for life should keep down the taxes and interest on incumbrances, is, that in equity, every part of the ownership of real estate should bear a ratable proportion of the incumbrances thereon; but that where parties contract for the use of land, for a longer or shorter period, for a certain or uncertain term, for years or for life, and fix for themselves the terms and conditions upon which the land is demised, this equitable doctrine is inapplicable and should not be invoked.

Such a distinction is not well founded, and cannot be maintained. The obligation of the life tenant does not rest in covenant, express or implied, but in equity, and exists as an incident to the estate. When, therefore, one contracts for a life estate, he must be supposed to contract with reference to the incidents thereto attached. The reservation of rent does not change the nature of the estate, nor create an equity in favor of the tenant for life paramount to that of the reversioner or remainder-man. If there be any presumption from such reservation, it is that the amount of rent is fixed with reference to the obligations incident to the estate, not as superseding them. A tenant for life acquires an estate of freehold, by virtue of the term, irrespective of the manner in which that estate is created, whether by operation of law, by grant, demise, gift or purchase; and a charge upon the estate, whether by way of rent, annuity or otherwise, does not affect the nature of the estate. In the present case, there is nothing in the language of the demise from which it can be inferred that any other or different rule should apply than that ordinarily incident to estates for life, however created. If it be conceded that the defendant would have been subjected to an equitable liability in favor of the plaintiffs or their grantees of the rever-

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Opinion of the Court, by SANFORD, J.

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sion, to keep down the taxes during his term, but for the words "at the annual rent of one dollar," inserted in the *habendum* clause, it is difficult to perceive upon what ground the mere reservation of that nominal sum, by way of annual rental, without covenant or condition, can be deemed to cancel or discharge that liability, or merge it, as it were, in a paramount obligation. The inference that such rent was intended to represent the fair annual value of the land, and to constitute an adequate compensation for its use, free of all other charges or incumbrances, so as to shift the burden of such charges from the lessee for life to the remainder-man or reversioner, is warranted neither by the language of the instrument nor by the circumstances of the case.

If these views are correct, the order appointing a receiver was authorized, and should be affirmed (*Carnes v. Chaubert*, 3 *Edw. Ch.* 312).

Order appealed from affirmed with costs.

CURTIS, Ch. J., and FREEDMAN, J., concurred.



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Statement of the Case.

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FRANCIS C. CORMIER, PLAINTIFF AND RESPOND-  
ENT, v. WILLIAM BATTY, DEFENDANT AND AP-  
PELLANT.

FORMER ADJUDICATION.

The argument of this appeal was upon the rulings of the court below upon a second trial ordered by the general term. The court held that such rulings were in accordance with the views expressed by the general term on the former appeal, and therefore affirm the judgment, in a brief review of and opinion on the case. See *Cormier v. Batty*, 41 *N. Y. Superior Court Reports*, 70, for full head-notes and points of counsel.

Before SANFORD and FREEDMAN, JJ.

*Decided May 8, 1877.*

Appeal by defendant from a judgment for \$4,495.49 entered on a verdict in favor of plaintiffs.

The action was brought to recover damages for the wrongful conversion of a quantity of red cedar logs and cedar bolts. A general denial of the allegations of the complaint constituted the issue.

The facts are stated in the report of an appeal from a judgment in favor of the defendant entered on a verdict rendered by direction of the court at a former trial (*Cormier v. Batty*, 41 *N. Y. Super. Ct.* 70). That judgment having been reversed, a second trial was had, which resulted in a verdict for the plaintiffs. From the judgment entered thereon, the defendant now appeals.

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Opinion of the Court, by SANFORD, J.

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On the second trial, the record of a judgment rendered by the supreme court, in a suit to which the present plaintiffs and defendant were parties, and in which was litigated the question of their respective claims to the property now in controversy, was offered and admitted in evidence on behalf of the plaintiffs, under defendant's exception.

The defendant also offered to show that the property in controversy passed into the possession of a receiver, appointed at the instance of the plaintiffs, in the said action in the supreme court, and was afterward surrendered to the defendant pursuant to an order made therein, on his executing a bond as thereby required. This evidence was rejected as immaterial and irrelevant, the defendant excepting.

Exceptions taken to the charge were not urged upon the argument.

*John E. Parsons*, for appellant.

*T. H. Rodman, Jr.*, for respondent.

BY THE COURT.—SANFORD, J.—The only points made by counsel for the defendant and appellant upon the argument of this appeal, relate to rulings of the court below, in admitting or excluding evidence. Such rulings appear to be in accordance with the views expressed by the general term, on the former appeal. It is urged that the record of a judgment rendered by the supreme court, in a suit to which the plaintiffs and defendants in this action were parties, and in which were litigated their respective claims to the ownership of the property now in controversy, was erroneously received in evidence. It appears from such record

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Opinion of the Court, by SANFORD, J.

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that the defendant claimed title to such property as against the plaintiffs, by virtue of an alleged sale and transfer thereof to him by a copartnership firm of which the plaintiffs were members. Such alleged transfer was held to be fraudulent and void as against the plaintiffs, and there was an express finding that the plaintiffs had never parted with their title to such property or with their right to the possession thereof. As a former adjudication, the record was competent proof of the plaintiff's ownership, and tended to show a tortious taking by the defendant. It was not only competent but conclusive, and the defendant was not at liberty to contradict it by showing that he purchased the property innocently.

That the property in question was temporarily withdrawn from the defendant's possession, pending the suit in the supreme court, by a receiver appointed therein at the plaintiff's instance, does not affect the question of defendant's liability or mitigate the damages recoverable against him. The possession of the receiver was the possession of the court, not of the plaintiffs. The receiver was the agent of the court. He represented both the parties, and protected the interests of both. It was wholly immaterial whether the plaintiffs were privy to his action in securing the safe custody of the property, or assisted him in effecting its removal and deposit in store. There is no pretense that the defendant ever withdrew his claims or surrendered the property. On the contrary, he offered to prove that its possession was surrendered to him by the supreme court, on his complying with certain terms, imposed by that court as the condition of such surrender. The only interruption to his possession which the excluded testimony tends to establish, was an interruption by that court, which in no respect tended to indemnify the plaintiffs or lessen the damages to

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Opinion of the Court, by SANFORD, J.

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which the defendant's wrongful action subjected them.

The judgment should be affirmed, with costs.

FREEDMAN, J., concurred.

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Statement of the Case.

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JOHN ROSS, PLAINTIFF, v. ELIZABETH HARDEN,  
ADMINISTRATRIX, &C., AND AMOS H. TROW-  
BRIDGE, ADMINISTRATOR, &C., DEFENDANTS.

EXECUTORS AND ADMINISTRATORS.

LIABILITY OF, IN THEIR REPRESENTATIVE CAPACITY.

A party who has rendered services to the estate after the death of the testator or intestate, but in pursuance of a contract made with the latter during his life, can recover the value of the same, in an action against the executors or administrators.

Where such an action has been brought, and a jury found the contract to have been made as claimed by the plaintiff, the verdict cannot be disturbed except for errors of law committed on the trial.

Where exceptions taken on such a trial are ordered to be heard in the first instance at general term, no question of fact can be considered by the general term; nor the point that the verdict is against the evidence; nor can the verdict be set aside on the ground that it is excessive; and the exception to the decision of the motion for a new trial on the minutes of the court, is also unavailable. The only mode for reviewing such decision is by an appeal from the order denying the motion. (See cases cited in the opinion of the court.)

EVIDENCE.

ADMISSIBILITY OF, UNDER § 399, CODE.

In the case at bar the court, against the objection and exception of the defendants, permitted the plaintiff to testify on his own behalf to a conversation and interview with the defendant's intestate in regard to the services that he was to perform, and which were the subject of this action, upon the theory that the witness could leave out his own personal share of the conversation, and testify only to such part thereof as was had between the deceased and another.

*Held*, to be error, as such testimony was within the rule excluding such transactions and communications (Code, § 399). Cases cited and commented upon: *Simmons v. Sisson*, 26 N. Y. 276; *Lobdell v. Lobdell*, 36 N. Y. 333; *Cary v. White*, 59 N. Y. 338; *Brague v. Lord*, 41 *Super. Ct. Reports*, 193.

Before CURTIS, Ch. J., SANFORD and FREEDMAN, JJ.

*Decided May 8, 1877.*

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Opinion of the Court, by FREEDMAN, J.

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The action was brought to recover for services rendered to the estate of George Harden, deceased.

The defense was a general denial.

The jury rendered a verdict for plaintiff for \$7,200, and \$1,276.80 interest, total \$8,476.80.

The defendants moved for a new trial on the minutes, on the ground that the verdict was against the evidence and against the charge, and was excessive as to damages.

This motion was denied, and defendants excepted.

The court ordered the exceptions to be heard in the first instance at the general term.

*Geo. W. Lord*, for plaintiff.

*Charles A. Davison*, for defendants.

BY THE COURT.--FREEDMAN, J.—The plaintiff seeks to recover for services alleged by the complaint to have been rendered by him to the estate of George Harden, deceased, at the request of George Harden shortly previous to his death, and also at the request of the defendants in their representative capacity.

Such double request could be legally pleaded and proven in the action as brought, provided the contract was, in fact, made by the deceased (*Benjamin v. Taylor*, 12 *Barb.* 328).

If, on the other hand, the contract was not made by the deceased, but by the administratrix and administrator, the action should have been brought against the defendants individually, for the rule is well settled that the contracts of executors and administrators, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration moving between the promisee and the executors or administrators as promisors, are

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Opinion of the Court, by FREEDMAN, J.

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the personal contracts of such executors and administrators, and do not bind the estate, notwithstanding the consideration moving from the promisee is such that the executors or administrators could properly have paid for the same from the assets, and been allowed for the expenditure in the settlement of their accounts (*Austin v. Munro*, 47 *N. Y.* 360 ; *Ferrin v. Myrick*, 41 *Id.* 315 ; *Cary v. Gregory*, 38 *N. Y. Super. Ct.* 127).

Upon the trial no attempt was made to show a contract by the administrators, nor was any evidence given of any promise on their part. Plaintiff confined himself to the establishment of a contract with the deceased and the rendition of services thereunder.

If, in pursuance of a contract thus made, services had been rendered before the death of the deceased, there could be no doubt that the action was maintainable for their value against the defendants in their representative capacity.

The general rule has been established from very early times, with respect to such personal claims as are founded upon any obligation, contract, debt, covenant, or other duty, that the right of action on which the testator or intestate might have been sued in his lifetime, survives his death, and is enforceable against his executor or administrator. And the revised statutes expressly provide that actions of account, and all other actions upon contract, may be maintained against executors in all cases in which the same might have been maintained against their respective testators. And that administrators shall answer and be accountable to others to whom the estate was holden or bound, in the same manner as executors (2 *R. S.* 113 ; 3 *Rev. St.* [5th Ed.] 201, §§ 2, 3). The executors or administrators so completely represent their testator or intestate, with respect to the liabilities above mentioned, that every bond, or covenant, or contract of the deceased includes

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Opinion of the Court, by FREEDMAN, J.

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them, although they are not named in the terms of it (*Wentw. Off. Ex.* [14th Ed.] ch. 11, pp. 239, 243), for the executors or administrators of every person are implied in himself (By Lord MACCLESFIELD in *Hyde v. Skinner*, 2 *P. Wms.* 197; *Harwood v. Hilliard*, 2 *Mod.* 265).

The next question, therefore, is whether it makes any difference that the services were rendered after the death of, but in pursuance of a contract with, George Harden.

There are many cases in which a liability may accrue against the executor or administrator, after the death of the testator or intestate, upon a contract made in his lifetime, although the executor or administrator be not named therein.

Thus, the executor is liable upon a bond which becomes due, or a note payable subsequently to the death of the testator.

So, if A. be bound to build a house for B. before such a time, and A. die before the time, his executor is bound to perform this contract.

And upon a contract by the decedent for the purchase of land, where the land has not been conveyed to him, nor the purchase money paid, the land contracted for is, in equity, considered as real estate, and as belonging to the heirs of the decedent; and the unpaid purchase money is primarily chargeable upon his personal estate, and is to be paid by his executors or administrators for the benefit of such heirs.

It is only in cases where the contract is *personal* to the testator or intestate, that no liability attaches upon the executors or administrators, unless a breach was incurred in the lifetime of the deceased.

Thus, if an author undertakes to compose a work and dies before completing it, his executors are discharged from this contract; for the undertaking is merely personal in its nature, and by the intervention



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Opinion of the Court, by FREEDMAN, J.

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of the contractor's death, has become impossible to be performed.

So, a covenant by a master for the instruction of his apprentices is personal to the master, and his executors are not liable upon it.

But the covenant on the part of the master for maintenance of the apprentice still continues in force, and, therefore, the executor is liable, as far as he has assets, if he neglects to maintain him.

I am, therefore, of the opinion that the plaintiff is not precluded from maintaining the action as brought by reason of the fact that the services were rendered after the death of George Harden; nor is there anything in the relations which he sustained to the deceased and the defendants that makes it inequitable or improper to allow him a fair compensation for the services actually rendered. The circumstances under which they were rendered were as follows:

Mr. George Harden died on the 6th day of March, 1872. He was the owner of a large personal estate, amounting to about \$1,250,000, consisting of stocks, securities, and choses in action. These securities were kept by him in a tin cash-box, which was usually kept in the Bank of the State of New York. On the 4th day of March (1872), the plaintiff, who had been for several years the confidential clerk of Mr. Harden, brought the box containing the securities from the bank to his (Harden's) residence, No. 22 Cornelia-street. The box was opened by Mr. Harden, and then was again locked by him, and thereupon the key of the box was delivered by him to the plaintiff. At the same time, he stated to his wife (the defendant, Mrs. Elizabeth Harden), in the presence of the plaintiff, what his desires and intentions were in reference to the custody and disposition of the box and its contents after his death.

It is claimed on the part of the plaintiff, that the

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Opinion of the Court, by FREEDMAN, J.

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delivery of the key of the box by Mr. Harden to him, and the declarations made by the deceased at the same time, amounted to an express or implied request, that the plaintiff would take the care and custody of the box and its contents until the administrators were appointed.

After the death of Mr. Harden, the plaintiff took the box to his house, No. 337 East Ninth-street, where it remained until the next day, when it was taken by the plaintiff to the Safe Deposit Company, where it was deposited and left in a box hired by the plaintiff, until the 14th day of March, when the box and its contents were handed over by the plaintiff to the defendants, who had been in the mean time appointed administrators.

Mr. Harden has no children or relatives residing in this country. His next of kin resided in Ireland, and after his death they or their representatives came over, and the securities were divided among them.

At the time of Mr. Harden's death, the plaintiff had in his hands checks which had been signed and delivered to him by Mr. Harden in blank ; also a considerable portion of the stocks contained in the box stood in the *individual* name of the plaintiff ; whilst a considerable portion of the securities *were transferable by delivery*, and there is no evidence to show that any person other than Mr. Harden and the plaintiff had any knowledge of the value or extent of his estate, or the nature of the securities, or whether the stocks standing in the plaintiff's name belonged to him or to Mr. Harden.

From these facts and circumstances it sufficiently appears, assuming them to have been established by competent evidence, that a special contract was made between George Harden and the plaintiff, whereby the latter undertook to take charge of the box and its valuable contents, and to become responsible for its safe-

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Opinion of the Court, by FREEDMAN, J.

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keeping from the time of Mr. Harden's death until administrators could be appointed, and that plaintiff's services were rendered in pursuance of such contract.

Some arrangement for the safe keeping of this immensely valuable and peculiar property up to the time that the personal representatives might be able to take charge of it, was absolutely necessary to the security of the estate; and if the contract which is alleged to have been made with the plaintiff, though it remained executory during the life of Mr. Harden, had been made with, and subsequently performed by a stranger or an institution engaged in that line of business, it could not be questioned that such stranger or institution might maintain a claim against the estate for the service rendered. Why, therefore, should the mere fact that the plaintiff was the confidential clerk of George Harden, make any difference? His general employment as such ceased with the death of his employer, and the administrators of the latter could not compel a continuance of his services. The safe keeping of the personal property entrusted to him, in the condition in which it was, involved duties and responsibilities very different from those which he had previously discharged in the service and under the eye and immediate instructions of the deceased. Besides, it involved a heavy responsibility. Consequently as long as plaintiff fully discharged the high trust reposed in him, I can perceive of no reason why he should not, at least, have the same claim and the same right of action against the estate that a stranger would have possessed. Public policy is not against it. To deny him the benefit of this position, would leave him without any remedy whatever, for he cannot sue the defendants individually, because no contract was made with them either as individuals or as representatives. Besides, it is not disputed that the services for which compensa-

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Opinion of the Court, by FREEDMAN, J.

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tion is sought, were actually and faithfully rendered, and that they were highly beneficial to the estate.

As a consequence, a dismissal of the complaint would have been error.

The action being maintainable in the form it was brought and the jury having found the contract to have been made as claimed by the plaintiff, the verdict cannot be disturbed except for errors of law committed on the trial. Defendant's exceptions were ordered to be heard in the first instance at general term, and the entry of judgment was suspended. Upon such a disposition of the case no question of fact can be considered by the general term, nor the point that the verdict is against the weight of evidence (*Mason v. Breslin*, 2 *Sweeny*, 390 ; *Hotchkiss v. Hodge*, 38 *Barb.* 118). For the same reason, the verdict cannot be set aside on the ground that it is excessive, for that would involve an examination of the facts upon which it is based.

The exception to the decision of the motion for a new trial upon the minutes of the court is also unavailable to the defendants. The only mode for reviewing such decision is by an appeal from the order denying the motion (*Gregg v. Howe*, 37 *N. Y. Superior Ct.* 424).

The questions left to be considered are mainly questions of evidence.

The only witnesses called to prove the contract with the intestate were the plaintiff and the defendant Elizabeth Harden.

The court, against the objection and exception of the defendants, permitted the plaintiff to testify on his own behalf to a conversation and interview with the defendants' intestate. In so doing, the court acted upon the theory that the plaintiff could testify to conversations between the deceased and another, although the plaintiff was interested in the subject matter of the conversation, and participated therein, so long as the

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Opinion of the Court, by FREEDMAN, J.

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plaintiff left out his own personal share of the conversation, so that the conversation and interview were (under the restriction and limitation imposed by the court upon its admissibility) presented in a mutilated shape.

This evidence, it is claimed by the defendants, was received in violation of the 399th section of the Code, and upon a most diligent search I have been unable to find any authority in favor of its admissibility.

The fact that the plaintiff was interested in and took part in the conversation, distinguishes the present from the cases of *Simmons v. Sisson* (26 *N. Y.* 276), and *Lobdell v. Lobdell* (36 *Id.* 333).

An examination of these cases will show that in neither case was the witness interested in, nor did he take part in, the conversation about which he was interrogated. Both cases were likewise decided upon the peculiar language of the 399th section of the Code, in which the word "personally" was used, so as to limit the section to transactions or communications "personally had." Since that time the 399th section of the Code has been amended, not only in enlarging the class of parties who are subjected to its provisions, but also by striking out the words "personally had," and inserting the word "personal" before transaction or communication, so that the exclusion of the evidence depends upon the nature of the transaction or communication, and not upon the parties by or between whom it was physically had or made.

The latter case of *Cary v. White* (59 *N. Y.* 338), is claimed, however, as an authority in favor of the admission of the evidence. But the report of this case shows that a majority of the court did not concur upon the point upon which it is claimed to have been affirmed, nor does it appear that the witness had, at the time of the conversation, any interest in it, or that the transaction out of which the litigation arose was

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Opinion of the Court, by FREEDMAN, J.

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the subject of the conversation. What the fact was which was sought to be proved, does not appear in the statement of the case, for the reason that the objection was put upon a ground which rendered a statement of the fact to be proved unnecessary; and inasmuch as the appeal in the court of appeals was from an order granting a new trial, and the court affirmed the order and gave judgment absolute against the appellant pursuant to the stipulation required by the code to be given in such cases, no means are left of ascertaining what evidence would have been elicited, had the excluded question been put. From the opinion of JOHNSON, J., concurred in by GROVER, J., it appears, however, that the only two judges who expressed their views, were of the opinion that the evidence, if admitted, would not have shown a personal transaction or communication between the plaintiff and the deceased, and that for that reason it would have made no difference, if plaintiff had participated in the conversation.

The facts in the case at bar are materially different. It here appears that the conversation to which the plaintiff testified, related to his employment by the intestate to perform the services for which the action was brought, and related, therefore, to a personal transaction with him and in which he was interested at the time. The plaintiff, after being cautioned by his counsel not to testify to anything that took place between himself and the deceased, was asked to state what the deceased stated in his presence to anybody else, and he commenced by saying: "I am going to." These were obviously not the words of the intestate, but of the witness, who was going to tell what the intestate had said, and who thereupon proceeded as follows:

"He said for to hire a safe and to put the things in the Safe Deposit Company, and keep them there until James Gray came out. And told Mrs. Harden, too,

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that a box should be bought for James Gray exclusively, and that his securities should be separated to the extent of \$500,000. He made a memorandum when he was not able to speak scarce, except with an effort, for to separate those securities. The conversation was that a safe was to be got in the Safe Deposit Company. That the valuables were to be deposited there, and kept there until James Gray arrived here.

“Q. Was anything said in the conversation that you heard, as to who was to take charge of those securities, or of Mrs. Harden, or anything of the kind? A. Yes, sir; I was to take charge.”

All this testimony was objected to as incompetent and improper, and the last answer defendants' counsel moved to have stricken out, but the court overruled the objection and denied the motion, to which rulings defendants' counsel duly excepted.

There can be but little doubt that the direction given in the course of the conversation testified to, that plaintiff should take charge of the securities, that a safe should be hired and that the securities should be deposited in the Safe Deposit Co., was a communication addressed personally to the witness, and not to Mrs. Harden, for Mrs. Harden herself was to be cared for by the plaintiff, and that the plaintiff so understood it, is rendered certain by the fact that he complied with the direction.

It is upon this testimony that the plaintiff's claim to having been employed mainly rests, and it is manifest that such contract of employment, if made as claimed, was not only a personal transaction between the witness and the intestate, but that it was personally concluded, and hence it is clearly within the mischief of the rule excluding such transactions and communications. It was none the less personal between the witness and the intestate, because Mrs. Harden participated in it, and as a personal transaction or



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communication it was infinitely more explicit than the nod of Mr. Lord's head towards the plaintiff, in *Brague v. Lord*, recently decided by the court of appeals. That action was brought for services rendered by the plaintiff as an attorney at law to Rufus W. Lord, deceased, the defendant's testator, in relation to the recovery of certain stolen property consisting of a large amount of valuable securities owned in part by Rufus W. Lord and in part by a Mr. Barron. Upon the question of retainer the plaintiff was allowed to testify, among other things, that he was introduced by Barron to Lord as his, Mr. Barron's, attorney. That on that occasion Mr. Barron and Mr. Lord talked of a power of attorney they had given, and that they agreed together, on the advice of the witness, to revoke that power, which was done. On a subsequent occasion the witness testified to an interview between himself, Mr. Lord, and his brother, Thomas Lord, at which he said the subject of payment for his services arose; that it was during a negotiation as to an amount to be paid in London, and Mr. Rufus W. Lord said to Mr. Thomas Lord, "We cannot tell what we will have to pay until we know what our lawyer's charges are," turning to plaintiff, the three being together, turning his head towards plaintiff.

With respect to this testimony, RAPALLO, J., in delivering the opinion of the court, says: "Advice given by the plaintiff to Mr. Lord was a personal communication and transaction between them within the meaning of the 399th section, and, connected with the proof that Mr. Lord accepted and acted upon such advice, was material, and tended to maintain the issue on the part of the plaintiff. Mr. Lord's remark about what he would have to pay his lawyers, turning towards plaintiff, appears to have been addressed to plaintiff, as well as to Mr. Thomas Lord, and may have satisfied the jury that Mr. Lord looked upon plaintiff as his



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Opinion of CURTIS, Ch. J.

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lawyer throughout the transactions, and conceded that he would have to pay him as such. The remark to Mr. Thomas Lord about paying their lawyers, did not of itself amount to much. It derived its significance wholly from the alleged turning towards plaintiff and thus giving him to understand that he was the party referred to. This, we think, was a personal communication within the intent of the 399th section."

Entertaining these views, the court of appeals reversed the judgment and ordered a new trial, and this notwithstanding the fact that there was other evidence in the case upon which the jury might have found a retainer.

The reception of the evidence above referred to therefore constituted error.

Defendants' exceptions should be sustained, the verdict set aside, and a new trial ordered with costs to defendants to abide the event.

SANFORD, J.—I concur in the result, and in so much of the opinion of FREEDMAN, J., as holds that the plaintiff was erroneously examined as a witness in his own behalf in regard to a personal transaction or communication between himself and the defendants' intestate.

CURTIS, Ch. J.—The defendants claim that the evidence wholly fails to establish any employment of the plaintiff by George Harden, the deceased, or by the defendants, to render the services sued for.

George Harden died March 6, 1872, leaving a personal estate variously estimated above \$1,200,000, consisting of money, stocks, securities and choses in action. Many of the stocks and securities stood individually in the name of the plaintiff at the time, and were transferable by delivery. The plaintiff had been for many years his messenger and clerk, at a salary of \$60 per month. The deceased had no children, and his relatives and next of kin resided in Ireland.

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Opinion of CURTIS, Ch. J.

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On March 4, 1872, two days before his death, the plaintiff brought from the bank to the house of the deceased, the tin box that contained these securities. The deceased opened the box, in the presence of his wife, the administratrix, and of the plaintiff. A conversation occurred, and when the plaintiff testified, the court excluded his evidence as to what was said to him by the deceased, but allowed him, under defendant's exception, to testify as to what he said to his wife, Mrs. Harden. The construction given to the 399th section of the Code in *Carey v. White*, 59 N. Y. 336, and in *Brague v. Lord*, in the court of appeals, not yet reported, was as it appears to me, adhered to by the court, as far as the conversation presents anything intelligible, which was very little. The testimony of the plaintiff under this ruling, as to what was said to Mrs. Harden is very obscure, and fails to show satisfactorily any request by the deceased that he should take the custody of his personal estate, and has little if any relevancy to the request and employment alleged by the plaintiff. It amounted in substance to the deceased giving his wife some general statement, as to what he intended to do in placing and separating his securities, and saying to her, that she would be well taken care of, and that the plaintiff would see to her, and see that she was all right. It appears that he was scarcely able to speak; but his direction seems to have been that the plaintiff should take charge of his wife. The defendant, Mrs. Harden, testified that the deceased at this interview "opened the box and was going to separate the securities, he told Ross to get another box made, and put James Gray's name on the box, and have the securities separated." She also says that "he then gave the key to Mr. Ross." On the next day, or the day after, the plaintiff drew the balances in the banks standing to George Harden's credit, and amounting to over \$100,000, in bank notes,

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and took them to his house, when he found him dead on his arrival. These bills he then put in the tin box, and carried it across the city to his own residence a day or two after, about dark, kept it over night, and the next day hired a box in the safe deposit company, in his own name, and placed it there. He also telegraphed to James Gray, the nephew of the deceased, in Ireland, who soon reached here.

This box and its contents were delivered to the defendants by the plaintiff, on the 14th of March, when they received their letters of administration.

The evidence appears to have satisfied the jury, that there was a contract, express or implied, between the plaintiff and the deceased, by which the former was to safely keep and preserve this large personal estate, until the rights of the next of kin could be protected by a proper notification and administration.

The custody of this personal property in the condition in which it was, involved a great responsibility, on the part of the plaintiff, that could only be properly discharged by reticence, and by the exercise of good judgment and integrity. It involved duties and responsibilities very different from those which he had previously discharged in the service, and under the eye and immediate instructions of the deceased.

The jury, if the case came properly before them, had a right to look at what transpired at the interview, when the deceased gave the key of his box to the plaintiff, and to put such an interpretation upon that act, in view of the situation of all parties, as expressed the real intentions of the deceased. Taken in connection with what Mrs. Harden testifies he previously told the plaintiff, and his failing condition, the evidence perhaps warranted the jury in finding that the defendant employed the plaintiff to perform the duty which it is not disputed he discharged in a faithful and commendable manner.

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There is another difficulty in these questions of fact. They come before the general term in a case where the unsuccessful party moves for a new trial, upon exceptions taken by him at the trial, and which have been ordered to be heard in the first instance at the general term, and judgment in the mean time suspended. In such a contingency it is held, that at the hearing, no question of fact can be discussed, nor the point that the verdict is against evidence (*Mason v. Breslin*, 2 *Sweeny*, 390; *Hotchkiss v. Hodge*, 38 *Barb.* 118; *Dickerson v. Wason*, 48 *Id.* 412).

Whether the verdict was excessive, is a question not entirely free from embarrassment. The plaintiff valued his services at \$10,000. The defendants called no witnesses to show what compensation or commission would be charged by institutions or persons, usually performing similar services, with similar responsibilities. One of the defendants testified, that she had said to the plaintiff, that if it was not paid, she would pay it herself. The other defendant testified, that he found there was very little to be done for the estate; that it was not an intricate estate, that the affairs were all personal property, and mostly in this tin box, that he thought the estate was worth about \$1,200,000, and that the surrogate allowed him for his compensation as administrator \$12,000. This was one per cent. on his estimate of the amount of the estate. In every commercial community, where great responsibilities are confided to a person possessing good judgment and strict integrity, the measure of compensation is proportionally increased. The possession and exercise of these qualities, under such circumstances, command the highest appreciation. As to this administrator, who with clerical aid, and legal advice, and under the protection of the law, thus discharged his trust, it is difficult to find that he was more than justly remunerated.

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When we see this plaintiff, comparatively unprotected and unaided, and at the most critical time, taking charge of this great amount of money and securities, for the benefit of these absent relatives of the deceased, and discharging his trust and its grave responsibilities, with excellent judgment and with integrity, it is quite possible the jury had some reason for considering that he was entitled to a compensation which they estimated at about one-half per cent. on his valuation of this property. It is urged, that considering the character and extent of the evidence placed by the parties before the jury, on this point, there is an absence of controlling reasons to set aside the verdict as excessive, and that it is against the policy of the law to disturb the finding of a jury in this respect, except to remedy some clearly shown wrong or grievance. Yet when we consider the plaintiff's relations with the deceased, and that a species of moral obligation devolved upon him to discharge this duty irrespective of any question of compensation, we are disposed to think that the verdict is excessive, and that a questionable precedent should not be established.

The exception taken by the defendants to the exclusion by the judge of the question addressed to one of the defendants, asking him to state the usual range of salaries to bank-clerks, occupying confidential positions, in March, 1872, is not well taken. The position they occupy has little if any resemblance to the trust confided to the plaintiff, and executed by him. The court also properly excluded the evidence offered to show that the plaintiff had been for a time subsequently employed by one of the defendants as her clerk or as such by both of them. Such employment was foreign to the issues, and totally irrelevant.

The court exercised a just discretion in denying

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the defendant's application to amend the complaint at the trial.

If there had actually been any payment for these services to the plaintiff, why should the defendants have served him, before he commenced his action, with a rejection of his claim, and also have omitted to have set up a payment in the answer?

It appeared at the trial, by the administrator's testimony that he had retained \$10,000 to meet this claim. To this the defendants excepted. It was not followed up by further evidence; and the judge charged the jury, that it was wholly irrelevant, and had nothing to do with the case. This evidence affords no ground for granting a new trial, even if the judge had not thus charged in respect to it. It was a proper course for the administrator to take, for his own protection, and such a course as any discreet business man would ordinarily take, and in no way calculated to lead the jury to consider the circumstance an admission of the plaintiff's claim. The judge charged, that there was no evidence of a promise by the defendants to pay the plaintiff's claim. Mrs. Harden in her testimony did not speak for the defendants, but gave expression simply of her individual appreciation of the value of plaintiff's services, when she spoke of paying the claim herself, if it was not paid.

The plaintiff testified at the trial "that he had no claim against the estate for any services rendered prior to Mr. Harden's death." Consequently, if entitled to recover at all, it must be for services rendered after his death, and either at the request of the deceased, or at the request of his administrator and administratrix. But his employment by Mr. Harden necessarily ceased when death terminated the latter's capacity to employ any one as the future steward or custodian of his personalty, and when at the same moment all his personal estate became vested in his personal representatives by

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operation of law (*Patchen v. Wilson*, 4 *Hill*, 57). Letters of administration relate back from the time of their issue for some purposes (*Priest v. Watkins*, 2 *Hill*, 225; *In re Faulkner*, 1 *How. Pr.* 207; *Vroom v. Van Horn*, 10 *Paige*, 558; *Allen v. Eighmie*, 9 *Hun*, 201).

No cause of action is established against the defendants as personal representatives of the deceased, by evidence of what services the plaintiff rendered by the request of the deceased, after his death.

The complaint is against the defendants as administrator and administratrix, both in form and substance. It demands judgment against them as such. It is in no respect against the defendants, individually. It alleges that the plaintiff also rendered services at their request made in their representative capacity.

This presents a serious difficulty in the plaintiff's case. It is the rule, that for services rendered at the request of an administrator, though for the benefit of the estate he represents, the estate is not bound, and that no recovery can be had against him in his representative capacity, or to be levied *de bonis testatoris*. (*Austin v. Munro*, 47 *N. Y.* 366, and cases cited; *Bucklin v. Chapin*, 1 *Lansing*, 450; *Cary v. Gregory*, 38 *Superior Ct. R.* 127).

The defendants were entitled to have their motions to dismiss the complaint granted, and their exceptions to the refusals were well taken and should be sustained, the verdict set aside, and a new trial granted, with costs to defendants to abide event.

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Statement of the Case.

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CHARLES N. BLACK, TRUSTEE, &C., PLAINTIFF AND  
RESPONDENT, v. SAMUEL B. WHITE, DEFENDANT  
AND APPELLANT.

PAYMENT OF MONEY, PRESUMPTION AS TO.

PROMISE TO PAY, WHEN IMPLIED.

Proof of the delivery of money, its reception and use, is not proof of an obligation on the party receiving and using it to return the same, and consequently does not establish an implied promise.

In proof of a count for money lent, &c., it is not sufficient to merely show that the plaintiff paid money to the defendant; such proof is *prima facie* evidence only of the payment by the plaintiff of his own debt, antecedently due to the defendant. The plaintiff must also prove that the transaction was essentially a loan of money to the defendant. A very slight circumstance may establish that it was a loan, or that it was paid at the request of the receiver, but there must be that circumstance to overthrow the legal presumption. 2 *Greenleaf on Evidence*, § 112; *Bogert v. Morse*, 1 *N. Y.* 377.

In this case, to make an implied promise to pay, it should have appeared that the money was paid upon the request of defendant, either express or implied. It was error for the court to charge substantially that the law implies an obligation or promise to return the money from the fact of its receipt and use by the defendant, throwing aside all the testimony as to which there was a conflict.

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

*Decided June 25, 1877.*

Appeal from judgment on verdict for plaintiff, and order denying motion for new trial, made upon the minutes.

The action is for the recovery of money advanced.

The plaintiff's case was as follows: Two firms, Hartshorne & Co. and Hartshorne & Brand, brewers,



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doing business in connection, failed in business and made an assignment for the benefit of their creditors to the defendant, who was one of the creditors. The defendant permitted or authorized the members of the insolvent firm to carry on the business with the assigned property for the benefit of the creditors. Nothing turns upon the validity or invalidity of this arrangement. Benjamin M. Hartshorne, a brother of a common member of the firms, placed \$10,000 in the hands of the plaintiff with instructions to advance it to be used in the business to be carried on, until the debts were paid, or until plaintiff should demand it, when it was to be paid to the plaintiff. On the trial, the plaintiff testified that he went to the defendant and stated his instructions, and the defendant assented to its being used in the business, until the debts were paid or until plaintiff should demand it, in which latter case defendant promised to pay it to plaintiff. Plaintiff then furnished the money to be used in the business. The money was invested and reinvested. Profits were made therefrom. The defendant closed up the business before the debts were all paid. The plaintiff demanded the \$10,000, which was refused.

The defendant's case was among other things that the plaintiff told him that he was about to advance the money to Hartshorne & Co., and Hartshorne & Brand, and that they were to repay it on demand, that he (defendant), never promised to pay it; that after the assignment, it was necessary to work up some material assigned, and he authorized his son, Frank White, to do what was necessary for that purpose; that he gave to Hartshorne & Co. and Hartshorne & Brand, no authority other than to collect debts.

It appeared that the money furnished to plaintiff, was in part handed to Frank White, agent, and in part to the members of the insolvent firm. The evidence as to this was obscure, and required construction by the

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jury. It also appeared that in some way or other the money or malt purchased by it had been used in working up the materials assigned.

The judge charged the jury that there could be no recovery unless the defendant had expressly promised to pay.

But at the end of the charge the plaintiff's counsel asked the court to charge that independent of the alleged agreement, if the defendant as assignee received and accepted the use of the money and profited by it, the law implies his promise to pay, on which a verdict may be founded, throwing aside the testimony as to which there is a conflict. The court charged agreeably to this request, to which defendant's counsel excepted. The verdict was for plaintiff.

*Samuel G. Adams*, attorney; *A. J. Vanderpoel*, of counsel, for appellant.

*Charles N. Black*, attorney for respondent; *Geo. Bowman*, of counsel.

BY THE COURT.—SEDGWICK, J.—In the hurry of the trial, I think the learned judge, did not scrutinize the language of plaintiff's request. The jury could take it to mean, that, if outside of the conflict as to what was the express arrangement, they were satisfied that the defendant as assignee took the money and then used it, there was, as matter of law, an implied promise to repay it. I do not think that proof of delivery of money, of receiving it, and using it, is proof of an obligation to return, and is therefore not proof of an implied promise.

Greenleaf gives (vol. 2, § 112), the law: "In proof of the count of money lent, it is not sufficient merely to show that the plaintiff paid money or a bank-check to the defendant, for this, *prima facie*, is only evidence of the payment by the plaintiff of his own debt, an-

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tededently due to the defendant. He must prove that the transaction was essentially a loan of money." A very slight circumstance may show that it was a loan or that it was given at the request of the receiver, but there must be that circumstance to overthrow the legal presumption (*Bogert v. Morse*, 1 *N. Y.* 377). If there were such circumstances in this case, the attention of the jury was withdrawn from a consideration of it, inasmuch as the charge said that the law implied an obligation from the receipt and use of money.

In this case, to make an implied promise from the receipt of the money, it should have appeared that the money was paid upon the request of the defendant, either an express or implied request. If the plaintiff gave the money at his own instance, it was nothing more than a gift. If he gave it at the instance of others, that would not create an obligation against defendant. So far as a request could be implied from the subsequent express promise, the jury might not have found that there was one, as the charge told them, that the receiving of money and profiting by it created an obligation, aside from the conflict as to the express promise. And indeed, the circumstance generally, outside of the arrangement in which the alleged express promise was made, do not conclusively show an actual or implied request. There was no express request, and there were no facts from which the law will imply one (*Lampleigh v. Brethwart*, 1 *Smith L. C.* 222). The case *Doty v. Wilson*, 14 *Johns.* 378, cited in *Lampleigh v. Brethwart*, says, "the benefit to the defendant connected with his express promise to pay, must be deemed equivalent to a previous request."

I am of opinion that on the case as presented by the plaintiff, he could not recover except upon the express promise, as to which there was a conflict; but if he

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could, the defendant had a right to ask that the jury should pass upon what was the express arrangement, if he gave proof as to one, *expressum facit cessare tacitum*. A man may recover on a general assumpsit, provided he could recover if there had been no special agreement, although one in fact was made. As in this case, although there was an express promise, as alleged by plaintiff, the latter could have recovered without satisfying the jury of the promise, provided he showed a request on the part of the defendant that the money should be advanced.

If there was a special agreement, and he could not recover on that, he cannot recover on a general assumpsit (*Robertson v. Lynch*, 18 *Johns.* 451 ; *Tuttle v. Mayo*, 7 *Id.* 132). Here the defendant gave evidence as to the circumstances under which the money was actually advanced by the plaintiff. If the defendant were correct in his recollection, this would have showed that the money was advanced upon the personal promise of the members of the insolvent firms to repay it ; therefore the defendant must have succeeded, although perhaps, as matter of fact, the defendant received the money as assignee, and profited by it as assignee or creditor. Perhaps other construction of the arrangement might have been made. But outside of this, the evidence would bear the inference that the money was voluntarily paid, upon no request or promise of defendant, but that the plaintiff was to look only to the result after payment of debts. The jury could have made an inference from the defendant's testimony, which would have shown that there was no implied promise, but an express arrangement under which he could not be liable. Therefore, I think it was error to charge that they might disregard defendant's testimony, provided outside of it there was an implied promise to repay the money.

I am of opinion, that from the character of the

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Opinion of the Court, by FREEDMAN, J.

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plaintiff's agency, as shown in his testimony, he could maintain this action.

For the reasons assigned, however, the judgment and order appealed from should be reversed with costs to appellant to abide event, and a new trial had.

SPEIR and FREEDMAN, JJ., concurred.

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SARAH N. HAWKS, PLAINTIFF AND RESPONDENT,  
v. WILLIAM W. WINANS, *et al.*, DEFENDANTS  
AND APPELLANTS.

NEGLIGENCE.

In this case, upon the trial in the court below, the verdict was for the plaintiff. The argument before the general term, was upon the usual questions in such cases:

*First.* Did the proofs establish that the accident was caused by the negligence of the defendants?

*Second.* Did the proofs establish that the negligence of the plaintiff did not contribute thereto?

The court, upon a full review of the facts and circumstances, fully set forth in the opinion, held the affirmative of each of these questions, and affirmed the judgment.

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

*Decided June 25, 1877.*

Appeal from judgment on verdict for plaintiff, and order denying motion for new trial.

The facts in the case appear fully in the opinion of the court.

*B. D. Silliman*, for appellant.

*George H. Yeaman*, for respondent.

BY THE COURT.—SEDGWICK, J.—The action was for

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damage, alleged by plaintiff to have, been caused by the negligence of defendant's servants, when she was leaving their ferry boat.

The learned counsel for the appellants maintains, upon exceptions made in due form at the trial, that the evidence for plaintiff, with certain facts stated by defendant's witnesses that must have been true, did not show any negligence on the part of the defendant's servants and failed to show that her own negligence did not contribute to the accident.

I am not able to agree with this position, and will state, as briefly as I can, the case, which, on the evidence, sustains the verdict, &c.

The manner in which the accident occurred is of first importance. The plaintiff walked to the edge of the boat. She there found, that the bridge on which she must go, in leaving the boat, was above the level of the deck about ten inches. She stepped up from the boat, and was assisted by the hand of her escort, who had been on the boat with her and had gone on the bridge before her. She and her witnesses state, that at this point, and when by a possible construction of the evidence, one of her feet was on the bridge and the other foot had left the boat, the bridge was suddenly lowered, by a deck hand of the boat. This caused her to fall upon the bridge at its edge, and in falling the leg that had reached the bridge received a blow that caused the greatest injury of which the plaintiff complains. The leg was not jammed between the boat and the bridge, for at that instant the boat was backing. There was evidence which would have justified the jury in saying that her foothold was lost by the boat backing, but the jury have credited the other version.

The first point then, is, was there any evidence that this cause of the plaintiff's falling was the result of negligence on the part of the deck hand. He denied

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that he did lower the bridge, but assuming that plaintiff's testimony on this point was correct, and considering the general facts of the situation as the deck hand himself swore to them, he was negligent, or at least there was evidence for the jury as to his negligence.

The deck hand was at the wheel which lowered the bridge. He faced the passengers, and he remembers seeing plaintiff as she was proceeding to get off. Some passengers were on the bridge. He had an opportunity to see the plaintiff's situation. It was his duty to the defendants, and to the passengers, to look about to see if it were prudent to lower the bridge. He knew that letting down the bridge would be an instantaneous matter, and would be likely to overthrow a person stepping on it. The jury would have a right to say, that he did not look to see if any one was in peril from the dropping of a bridge eight inches, or that he did see them and omitted to use any care for their protection.

The next point is, did the case not show that the plaintiff was free from negligence that contributed to the injury? Does it appear that she was prudent when she did not anticipate the lowering of the bridge? Negligence on her part as to something that did not contribute to the injury, would not prevent her having a cause of action. On the other hand, it might possibly be, in the present case, that the circumstances which would show that she was negligent as to leaving the boat before it was secured to the bridge, would also show that the circumstances would not justify her in believing that the bridge was not to be lowered to permit passengers to go on shore.

If there were, however, evidence that she was justified in believing that it was otherwise safe to step from the boat, the mere and sole fact of the bridge being higher would not show that there was to be a lowering of it before passengers could leave, either so far as

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safety was concerned or before the rules of the ferry were observed. The difference in level was not great or dangerous. If the attention of a person of ordinary intelligence were turned to the subject he might think there was no necessity of its being lowered, or perhaps that it could not be lowered further.

Therefore, it is only necessary to examine if there was not evidence to show that the plaintiff was free from negligence, when she assumed from the circumstances that the arrangements had been made which were to be made for the safe exit of the passengers, and, in particular, that the boat was secured to the bridge. If it appeared that the preparations for passengers leaving had not been completed, it might perhaps be careless for her to step on the bridge at all, or to assume at all that it was proper to do so.

The plaintiff and her witnesses testified that as they went towards the end of the boat the chain that barred the passengers' gangway was down. There is no direct evidence that one of the crew let it down, but from the circumstances, if the jury had found that Salters, the deck hand, did, it would not have been against the evidence, although he said he did not. If, however, the chain was down, without fault on the part of the boat, so that it could not be deemed an invitation from defendants' servants to passengers to proceed, nevertheless there was no warning from a chain barring the way, not to go further. The plaintiff could prudently go on, if she was not negligent thereafter. She had had express notice not to leave the boat until it was secured to the bridge. This notice did not increase or lessen her obligation to observe the situation, and to be careful in her action thereon, and to use her judgment to ascertain if the ferry hands had completed arrangements for leaving. She was bound to use her judgment and be careful, but an erroneous conclusion on her part would not make her negligent.



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Opinion of the Court, by SEDGWICK, J.

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According to her testimony, supported by other evidence, she found that the boat was close to the bridge, and, in fact, it was chained on her side, tight to the bridge, and was there in permanent contact with the bridge. She stepped off about three feet from the chain. The evidence generally showed that while it was true that at a certain point of time the boat began to back, it is also true that immediately upon that point of time the boat must have been at rest for an unfixed length of time, during which the inertia of the boat was being overcome by the wheels backing. It was then (the jury might have found) that the plaintiff saw, or thought she saw, the boat close up to the bridge.

The learned counsel for the appellant argues that the circumstances show that there must have been a gap between the boat and the bridge, for the reason that the boat did not go straight into the slip but on an angle, one side of the boat being nearer the bridge than the other. It is true that there must have been a gap. But how large was it? If great, there might have been negligence in supposing that the time to land had come. If small, under the circumstances, the jury could say that the plaintiff was justified in believing and testifying that the boat was close to the bridge. The physical facts did not necessarily show that, at a few feet from where the boat was in contact with the bridge, there was such a gap that it could not have escaped observation. If the testimony of the witnesses for defense on this point, was unopposed, the jury would not have been obliged to infer that their description of the size of the gap was accurate, or indeed, that as a fact, they particularly observed how wide it was at the point where the plaintiff stepped off. No data were given, on which a calculation could be made as to the width. The jury were at liberty to find, taking all the circumstances together that as the plaintiff saw that one

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chain was tight, and the boat was close to the bridge, she was using ordinary prudence in concluding that the boat was secured to the bridge. She was supported by the facts in believing, that when the boat was (as she judged), so placed that the two chains could be tightened up, as one was, the other also was.

I am of opinion, that the plaintiff did show facts which justified the jury in saying that it appeared that her negligence did not contribute with the defendant's negligence.

The judgment and order should be affirmed, with costs.

SPEIR and FREEDMAN, JJ., concurred.

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FRANCIS O'HAGAN, PLAINTIFF AND RESPONDENT,  
v. SIDNEY DILLON, DEFENDANT AND APPELLANT.

I. NEGLIGENCE—CONTRIBUTORY.

1. *INTOXICATION.*

a. Will not constitute contributory negligence unless its degree is such as to justify the jury in finding that the party was thereby disqualified from the exercise of ordinary care and prudence.

1. *What not sufficient to justify the jury in so finding.*

(a) The bare circumstance that he had indulged sufficiently in spirits to make the fact perceptible from his breath, is not.

II. TRIAL.

1. *Incompetent evidence, when not cause for reversal.*

(a) *IRRESPONSIVE ANSWERS.*

1. When a witness, to a question put, *volunteers* incompetent evidence, no cause for reversal results therefrom.

1. This although the question put was improper, but the responsive answer made to it had no force as evidence.

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1. *E. g.*, where the question put was whether the witness knew of a certain fact, and he answered that he did not, and then volunteered that he had heard there was some such thing.

(b) IMMATERIALITY.

1. The reception of incompetent evidence, which could not by any possibility have injured the party against whom it was given, is not cause for reversal.

2. INCOMPETENT EVIDENCE, WHAT IS.

(a) WITNESS, SUPPORTING OF.

1. Evidence purely in support of a witness cannot be given until a necessity has been shown for it by impeachment.

1. *E. g.*, where a witness has sworn to a fact on his examination, he cannot, before his recollection as to the fact has been attacked by the other, be asked by the party on whose examination he so swore as to the cause of his recollection or the means by which he refreshed it.

(b.) MEANS OF OBSERVATION, JUDGMENT OF WITNESS AS TO.

1. A question "Had you an opportunity of knowing, etc.," if not illegal, is immaterial where the witness has been examined as to all the facts that could be justly relied on to show opportunity of knowledge, or to show the fact as to knowledge of which the inquiry was made.

(c.) CONVERSATIONS HAD BY WITNESS, CONTRADICTING HIM.

1. *What not sufficient foundation for.*

- (a.) When he admits having had a conversation, but is not asked the details, a witness cannot be called to testify to the details.

2. *Collateral matter.*

- (a.) A witness on cross-examination denied that in a conversation with one Smith, he had said he was a man of influence. *Held*, that this was collateral, and not a proper subject of contradiction.

3. COMPETENT EVIDENCE, WHAT IS.

(a.) CREDIBILITY OF WITNESS, EVIDENCE AFFECTING.

1. The motives of a witness in testifying are relevant to the main issues.

(b.) COLLATERAL, WHAT IS NOT, AS TO MOTIVES.

1. Where a witness for defendant is asked on cross-examination as to whether he had not made to one B, certain statements which *tended to show that he meant to conciliate the defendant, by appearing as a witness and by his testimony*; and he denied making them, *B may be called to prove that he did make*

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Opinion of the Court, by SEDGWICK, J.

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*them*; because it is evidence as to the motive of the witness in testifying, and therefore not evidence on a collateral issue but evidence relevant to the main issue.

Before SEDGWICK, SPEIR, and FREEDMAN, JJ.

*Decided June 25, 1877.*

Appeal from judgment on verdict for plaintiff.

On the trial the judge charged, among other things, as follows:

"I charge you that no contributory negligence is to be imputed to him (the plaintiff) from the mere fact that he had indulged in drink merely to the extent of its becoming perceptible from the smell of the breath. He was bound to exercise reasonable care and caution, and unless you find that he was disqualified from the exercise of ordinary care and prudence, by over-indulgence in drink, it is not to be imputed to him as negligence that he had indulged sufficiently in spirits to make the fact perceptible from his breath."

The other matters necessary for the understanding of the decision appear in the opinion.

*Alex. Thain*, attorney, and of counsel, for appellant.

*George W. Lord*, attorney, and of counsel, for respondent.

BY THE COURT.—SEDGWICK, J.—The action was for damage to plaintiff, from falling into an excavation made by defendant in Fourth avenue.

The facts were fully examined on the trial. The jury were instructed by an impartial and clear charge, to which but one exception was taken. That exception referred to the remarks of the judge as to plaintiff's being intoxicated at the time of the accident, and the

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manner in which the jury should treat intoxication on the point of contributory negligence. It is unnecessary to go into particulars to show that the judge was correct in the law of his charge. It would only be a defense of well-known, often-repeated, propositions.

There was a motion for a new trial on the judge's minutes. No ground for a new trial was stated, and therefore it cannot be ascertained on this appeal even that the claim made was in its character (if well-founded) ground for a new trial under any circumstances. There was no preponderance of evidence on any point in favor of defendants that would have justified the judge in giving a new trial. There must, therefore, be an examination of the exceptions taken in the course of the trial.

The first was to the admission of a question: "Do you know anything about a party recovering a judgment of \$5,000 before Judge VAN BRUNT?" I have no doubt that the printed case does not fully show the circumstances of the admission of this question. Probably it was admitted on the ground that no injury could be done by its being answered, while it might serve as a key to the witness' recollection of some material matter. But the witness answered that he didn't know anything about it, and volunteered that he had heard there was some such thing. The judgment cannot be reversed for this uncalled-for speech. It does not constitute an error of law on the part of the judge.

A witness for defense testified that he had hung a lamp at the excavation on the evening before the accident, and said, "I expect I removed it from half-past four to five in the morning." Defendant's counsel then asked, "Is your recollection refreshed or your attention called to that from any circumstance, any accident that happened there?" This question was excluded. The general rule is that there can be no corroboration until a necessity has been shown for it by an impeachment. If a witness remembers what he tes-

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Opinion of the Court, by SEDGWICK, J.

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tifies to, that is all the party who calls him can have. The fact is before the jury that he has a recollection. Primarily, the cause of his having a recollection is not material. If the other side does not by cross-examination show that his recollection is not positive, it is presumed to be what he impliedly states it when he answers positively. Such a question as was asked might call out immaterial and trifling matter, tending to make a confusing and irrelevant issue. But on cross-examination the witness did state the cause of his having a distinct recollection that he hung out a lamp, and the defendant then obtained all that the excluded question (excepting the leading portion) could have obtained.

The question, "Had you an opportunity of knowing the condition of O'Hagan and his wife at that time as to whether they were intoxicated or sober?" was properly excluded. The case shows that the defendant was allowed to examine all the facts that could be justly relied on to show opportunity of knowledge or to show intoxication. The question, if not illegal, was not material to the defense as only calling for the witness' judgment as to his means of observation.

A witness (Smith) for the defense was asked by defendant's counsel if Burns, a witness for plaintiff, had not in a conversation referred to the claim in this action. The answer was yes, and the next question called for what Burns said. This was properly excluded, for Burns had not been asked the alleged details, but only if he had had any such conversation. The next question was, "Did not Mr. Burns at that time say to you that he was a man of influence?" This was also excluded. I do not think it was a proper subject of contradiction. If the question had been answered affirmatively, the jury could not properly have used it to lessen Burns' credibility. It is, moreover, doubtful whether Burns had been asked if he said this in a conversation with Smith about the claim in this action.

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There were other exceptions that arose from certain questions put to Bailey, who had first been called as a witness by the defense. The case states that he was afterwards recalled by the plaintiff, and his examination is headed by the words "direct examination," but from the whole case it is evident that the questions were asked as on a further cross-examination.

The witness testified that he had not said to Burns that if he (Bailey) had the \$10,000 that the defendant owed him he would not be a witness in the action, and that he did not say that the defendant had sent a telegram to him in New Jersey, and that he came expecting to get the debt, and instead of that a subpoena was served upon him.

Burns was afterwards called by plaintiff, and upon objection allowed to testify that Bailey had said the things which he denied saying.

The objection was that the subject of the alleged declarations was collateral, and the plaintiff was bound by the witness' answers. This does not seem to me to be the law. All that goes to show the motives of a witness in testifying is relevant to the main issue. "It is always competent to show the relations which exist between the witness and the party against, as well as the one for, whom he was called" (*Newton v. Harris*, 6 *N. Y.* 346, citing 1 *Greenleaf Ev.* 449-50).

In the present case, the plaintiff had a right to argue to the jury that the declaration showed that Bailey meant to conciliate the defendants by his appearing as a witness, and by his testimony, so that they would be the more inclined to pay what they owed him. This is by no means a necessary conclusion, for that might not have been the fair meaning of what was said, but the plaintiff had a right to take the jury's construction.

The last exception to be noticed is that the plaintiff was allowed to prove that during the afternoon before the accident the plaintiff and his wife were friendly and

Statement of the Case:

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did not quarrel. The defendants had given testimony to show that they had been quarreling immediately before the accident. Perhaps the plaintiff had a strict right to show that, so far as there were witnesses, no quarrel had occurred within a short period of time before the quarreling alleged by the defendants. But if there were no such right, I cannot see that the answer could by any possibility have injured the defendants.

I am, therefore, of opinion that the judgment should be affirmed, with costs.

SPEIR and FREEDMAN, JJ., concurred.

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HENRY WELSH, PLAINTIFF AND RESPONDENT, v.  
THE GERMAN AMERICAN BANK, DEFENDANT  
AND APPELLANT.

I. *DEPOSIT IN BANK PAYABLE TO THE WRITTEN ORDER  
OF THE DEPOSITOR.*

1. ACTION AGAINST THE BANK TO RECOVER.

(a) DEFENSES, WHAT ARE NOT.

1. *Check, payment of.* The fact of payment by the bank of the amount of a check drawn by the depositor to the order of a payee, to a person other than such payee, on the forged indorsement on the check of the name of such payee, does not constitute a defense.

1. It is not a payment to the written order of the depositor.

2. *Negligence of depositor.* This, unmixed with the element of inducement by or through the depositor to pay on the forgery, constitutes no defense.

1. *Negligence, what will not constitute.*

(a) A depositor signing checks for amounts not due to the payee, trusting, without making a personal examination, to his clerk's statement that such amounts were due, and after signing, handing them to the clerk, will not.



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Appellants' points.

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**II. RATIFICATION, WHAT DOES NOT AMOUNT TO.**

1. *Non-discovery* of the forgery of the indorsements upon checks drawn by a depositor to order of a payee, which checks had been honored by the depository and returned to the depositor with his pass-books where he was charged with the amounts thereof, for a length of time after such return, say two years, *and the not making any claim* against the depository until after such discovery, is not a ratification of the payments made on such forged indorsements.

**III. ACCOUNT STATED.**

1. DEFENSE OF, TO AN ACTION BROUGHT ON A CONTRACT.

**(a) PLEADING OF PLAINTIFF, WHAT NOT NECESSARY.**

1. *A reply* denying the account stated, or if admitting it, the setting forth that plaintiff was erroneously debited or credited therein (as the case may be), in respect of the cause of action, is not necessary.
2. *Amended complaint.* Nor is it necessary to amend the complaint by inserting allegations of error in the account, with a view to open it.

**(b.) OVERCOMING EFFECT OF DEFENSE OF; WHAT MAY BE SHOWN.**

1. Errors or mistakes affecting the result.

Before SEDGWICK, SPEIR and FREEDMAN, JJ

*Decided June 25, 1877.*

Appeal from judgment for plaintiff, entered upon verdict directed by the court.

*E. A. Acker*, attorney, and *D. M. Porter*, of counsel for appellant, cited the following cases:—(a) As to there being an account stated: *Bullock v. Boyd*, 2 *Edw. Ch.* 292; *Nevins v. Davison*, 6 *Selden*, 75; *Story's Eq. Jur.* 526. (b) As to pleadings necessary by the plaintiff: *Hutchinson v. Market Bk.*, 48 *Barb.* 321; *Nevins v. Davison*, 6 *Selden*, 75; *Bullock v. Boyd*, 2 *Edw. Ch.* 292; *Lockwood v. Thorne*, 1 *Kernan*, 170, 173; 18 *N. Y.* 285, 291, 292; *Manhattan Co. v. Lydig*, 4 *J. R.* 377. (c) As to the checks being payable to a fictitious person: *Coggil v. The Am. Ex. Bk.*, 1 *Comst.*

## Respondent's points.

113; National Bk. of Commerce in N. Y. v. The National Mechanics Banking Association of N. Y., 55 *N. Y.* 211. (d) As to plaintiff's negligence: *Allen v. Coit*, 6 *Hill*, 318; *Alderson v. Clay*, 1 *Starkey*, 403; *Hutchinson v. Market Bk. of Troy*, 48 *Barb.* 321; *Johnson v. First National Bk. of Hoboken*, 6 *Hun*, 124; *Nevins v. Davison*, 6 *Seld.* 75. (e) As to ratification: *Coggil v. Am. Ex. Bk.*, 1 *Comst.* 113; *Gloucester Bk. v. Salem Bk.*, 17 *Mass.* 42; *Lawrence v. Taylor*, 5 *Hill*, 114; *Ward v. Evans*, 2 *Salk.* 442; *Williams v. Mitchell*, 17 *Mass.* 98; *Story on Agency*, §§ 234, 260. (f) The plaintiff under the circumstances must himself bear the loss, the defendant being innocent and free from negligence. *Coggil v. Am. Ex. Bk.*, 1 *Comst.* 113; *Reddick v. Doll*, 54 *N. Y.* 234; *Young v. Grote*, 4 *Bingham*, 253; *Isnard v. Jones*, 10 *La. Ann.* 103; *Vanduzen v. Howe*, 21 *N. Y.* 351; *Russell v. Pond*, 56 *Id.* 57; *Ingham v. Primrose*, 28 *L. J.* 275; *Garrard v. Hadden*, 67 *Penn.* 82; *Hutchinson v. Market Bk. of Troy*, 48 *Barb.* 321; *Gloucester Bk. v. Salem Bk.*, 17 *Mass.* 42. (g) The effect of defendant's acts was to make the transaction valid as to defendant: *Smith v. National Bk. of Commonwealth*, 56 *N. Y.* 480; *Continental National Bk. v. National Bk. of the Commonwealth*, 50 *Id.* 575. Cases distinguished from this: 57 *N. Y.* 602; 11 *Id.* 404.

*Lemuel Skidmore*, attorney, and *E. L. Fancher*, of counsel, for respondent, urged:—I. When a check upon a bank is drawn payable to the order of a particular person, the bank is bound to ascertain the genuineness of the payee's indorsement before paying the check (*Morgan v. Bank State of N. Y.*, 11 *N. Y.* 404; *Graves v. American Exch. Bank*, 17 *Id.* 205; *Johnson v. Bank of Hoboken*, 6 *Hun*, 124, since affirmed by court of appeals).

II. There was not any negligence of depositor in

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this case to excuse the bank in paying a check upon a forged indorsement. There was no gross negligence (*Leavitt v. Stanton*, *Hill & Denio Supp.* 413).

III. *Weisser v. Dennison*, 10 *N. Y.* 68, is a case very similar to the present. In that case checks were forged by a confidential clerk of depositor, paid by the bank, charged in the depositor's bank-book, balanced and returned to depositor, yet the bank was held liable to refund the money to depositor, as the act of his clerk was not authorized. Even if an account were stated by return of the bank-book and vouchers, yet it may be impeached by showing fraud or mistake.

IV. The only authority given to Swindells by plaintiff on signing the checks, was to forward them to W. N. Johnson, a customer well known to both: in making any other disposition of the checks Swindells was a wrong-doer and did not represent the plaintiff (*Weisser v. Dennison*, 10 *N. Y.* 18).

V. This is not the case of a fictitious payee. A fictitious payee is one intended by the drawer to be fictitious and nominal (*American Exchange Bank v. City Bank*, 5 *N. Y. Leg. Obs.* 18).

VI. The plaintiff was guilty of no negligence in entrusting the checks to his book-keeper to forward to the customer Johnson (*Weisser v. Dennison*, 10 *N. Y.* 83).

VII. The plaintiff and defendant are not equally free from blame. The plaintiff is, on the contrary, not to blame at all. The defendant is to blame for paying checks to the wrong individual, when they were bound to ascertain that the indorsement was genuine. Had the bank performed this simple duty, no damage could have befallen it.

BY THE COURT.—SEDGWICK, J.—The action was upon contract. The complaint alleged that the plaintiff deposited with the defendant, from time to time, sums

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Opinion of the Court, by SEDGWICK, J.

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of money, amounting together to more than one hundred thousand dollars; that defendant promised plaintiff to pay the said money on demand to the plaintiff or to his order, in writing; that the defendant had paid to the plaintiff or his order all the said money excepting \$3,146; that the plaintiff, by order in writing, had demanded of the defendant the amount last named, but the defendant had refused to pay any part of the same.

The answer admitted the deposit with the defendant, the promise of the defendant as stated in the complaint, and the demand upon defendant.

There was a stipulation made by the parties, read upon the trial, that the plaintiff was entitled to recover the amount claimed, unless the defendant "shall be able upon the trial to establish one or more of the affirmative defenses pleaded in the answer, and by the legal operation of such affirmative defenses to defeat or lessen the recovery; and in attempting to prove any of the said affirmative defenses the defendant shall be confined to due proof of legal payment to the plaintiff," or his written order, of twelve checks amounting to the sum claimed, which the defendant had paid and charged to the plaintiffs' account. These checks were drawn to the order of W. N. Johnson, excepting one which had been drawn to the order of J. D. Johnson and then indorsed to the order of W. N. Johnson.

The proof showed that a clerk of plaintiff had drawn these checks and presented them to plaintiff to be signed as for amounts which the plaintiff owed W. N. Johnson. W. N. Johnson was in the practice of consigning butter to the plaintiff to be sold. The clerk took the checks after they were signed. The name of W. N. Johnson was forged upon them as indorser. The checks were then delivered to other parties, who indorsed them, and they were paid by defendants through the clearing-house.

As the stipulation confined the defendant to due

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Opinion of the Court, by SEDGWICK, J.

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proof of legal payment to the plaintiff, or his written order, of the amount of the checks, the plaintiff was entitled to recover upon the single fact that W. N. Johnson's name was forged. Beyond doubt, under the admission by the defendant of the obligation to pay to the order of plaintiff, it was not a legal payment. There was no pretense that the plaintiff took part in the forgery. Even if there were negligence on his part (there was in fact none), he had a right to rely on defendant's undertaking to pay to his order. If he did nothing to induce the defendant to pay upon the forgery, part of his rightful advantage was that though he was negligent, the defendants had contracted, that they would do that, which would prevent injury to him from his negligence.

It may be proper, however, to look through the defenses to see if there were any evidence in the case which called upon the court to send any defense to the jury.

The first defense was that the whole of the moneys deposited had been paid upon checks drawn by plaintiff, in fulfillment of the agreement stated in the complaint. This was certainly disproved, when it appeared that the checks required the defendant to pay their amounts to the order of W. N. Johnson, and the defendants had paid them without that order.

The next defense was that the checks were drawn to the order of a fictitious person, and that the plaintiff delivered them to his clerk who indorsed them in the name of the fictitious payee. The proof was conclusive that the payee, W. N. Johnson, was a real and not a fictitious person. In one instance the payee was J. D. Johnson. He was a book-keeper of the plaintiff, as I read the testimony of the latter. Before the plaintiff signed the last mentioned check, J. D. Johnson had indorsed it to the order of W. N. Johnson. This defense, therefore, had no evidence to support it.

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Opinion of the Court, by SEDGWICK, J.

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The next defense was, that after all the money deposited with defendant had been paid upon checks signed by the plaintiff, they stated "accounts between each other, which said accounts so stated showed that the said money had been paid out by this defendant upon such checks, which said checks were from time to time returned to and received by the plaintiff, and thereafter plaintiff assented to, ratified and confirmed such payment of said money." The only statement of account between the parties was such as consisted of entries made by the defendant, in the plaintiff's pass-book, charging him with the payment of the amounts of the checks, which were sent to the plaintiff with the book, corresponding balances being stated in the book.

The checks, with the forged indorsements, were among the checks returned. There was no other ratification of the payment, than the plaintiff not discovering the forgery, for some time, at the longest two years, and not making any claim upon defendant, until the discovery. Of course, whatever was the legal force of the retaining of the book by the plaintiff under the circumstances, whether it had only the effect of an admission, or was a technical account stated, the plaintiff had the right to show what errors or mistakes affected the result. The appellant's counsel urges, that the plaintiff should have pleaded the alleged errors in the complaint or by a reply. He was not called upon to open the account in the complaint (if there were an account stated), because his action was upon the contract set out, and the merit of the defense in its legal nature consisted of its showing a satisfaction of defendant's obligation under the contract. The defense was affirmative in its character and the plaintiff was not called on to meet it, until it had been pleaded. Of course, under the Code, he was not required to controvert the defense by a reply.

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Opinion of the Court, by SEDGWICK, J.

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The next defense was, that after the defendant had paid the moneys as the answer had stated, and after the plaintiff had discovered the forgery, he "delayed and failed to take the necessary steps to protect the parties to this action, and acted in collusion with said book-keeper or confidential clerk, both in the drawing, indorsement, delivery and payment of said checks, and ratified, adopted, and confirmed such payment, and authorized said indorsements and payments thereof." There was no evidence to support this defense.

The last defense was, that the plaintiff "so negligently and unskillfully signed said check and permitted said indorsements so to be made, and entrusted the same to his book-keeper or confidential clerk, and thereby gave him credit, and said checks were paid by this defendant in the usual course of business to this defendant's damage, to the amount of said sum, with the interest thereon, as stated in the complaint." The considerations pertinent to this defense, relate to the fact, that when the clerk presented the checks for signing, as being drawn for amounts due, the plaintiff believed the clerk, and did not look at the original entries to learn what the facts were. That is, he trusted his clerk. That trust was not negligence. Of course, handing the checks, after they were signed, to the clerk, was not negligence, nor did that give the clerk any credit with the defendants.

On the evidence in the case, and the stipulation, the judge was obliged to direct a verdict for plaintiff.

Judgment affirmed, with costs.

SPEIR and FREEDMAN, JJ., concurred.

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Opinion of the Court, by SEDGWICK, J.

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WILLIAM C. KNEELAND, PLAINTIFF AND APPELLANT v. CHARLES SPITZKA, DEFENDANT AND RESPONDENT.

I. MALICIOUS PROSECUTION.

1. SETTING ON FOOT PROSECUTION—WHAT IS NOT.

(a.) *A criminal complaint was made by A., against C. and others, charging them with a conspiracy to defraud by means of false pretenses. On this complaint C. was arrested, and gave bail to appear to answer any indictment that might be brought. B. did not instigate or promote this prosecution, but after the bail had been given he made, to the justice before whom A.'s complaint was made, a complaint against C. for obtaining money by false pretenses, and asked for a warrant; the justice refused to issue a warrant, but told B. that he could increase the amount of bail; he did not increase the amount of bail. All the complaints were sent to the district attorney, but it did not appear that B.'s complaint was brought before the grand jury.*

HELD

1. *That no prosecution had been set on foot by B.*

2. ENDING OF PROSECUTION—WHAT IS NOT.

(a.) *In above case the action of the grand jury refusing to find an indictment on the charge preferred by A., and the consequent discharge of C. from the recognizance given by him on that charge, is not an ending of the prosecution set on foot (if any such was so set on foot) by B.*

Before SEDGWICK and FREEDMAN, JJ.

*Decided June 25, 1877.*

Appeal from judgment entered on order at trial dismissing complaint.

The facts appear in the opinion.

*Albert Day*, for appellant.

*Robert D. Green*, for respondent.

BY THE COURT.—SEDGWICK, J.—The action was upon an allegation of a malicious prosecution. The



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following facts appeared in the testimony for plaintiff. One Hoese made a criminal complaint charging the plaintiff and two others with conspiring to defraud by means of false pretenses. The plaintiff was arrested, waived an examination and gave bail to appear to answer any indictment that might be found against him. The bond was given August 30. There was no fact tending to show that the defendant instigated, or in any way promoted the commencement of this prosecution.

After this bond was given the defendant made a criminal complaint against the plaintiff for obtaining money by false pretenses. This complaint was made on September 1. Other complaints of a like nature were made by other parties. The defendant asked that a warrant for plaintiff's arrest be issued on his complaint. The justice of the peace, who had before him all the complaints, refused to issue a warrant as asked by defendant. He testified that he (when he so refused) told the defendant and the other complainants that he could increase the amount of bail, so as to secure plaintiff's appearance, the same as if he should take new bonds. He did not increase the amount of bail, because the proof was that the plaintiff gave bail but once, and that was before the day the defendant made his complaint. The justice sent all the complaints to the district attorney. There was no proof that defendant's complaint was entertained or examined by or offered to the grand jury, or that he appeared as a witness.

On the the trial the plaintiff offered as testimony an order of the court of general sessions. The evidence was excluded as irrelevant. The order was a discharge of the plaintiff from the recognizance he had given upon the charge of conspiracy, and recited that the grand jury had examined the charge and refused to find a bill.

On these facts it is certain that the plaintiff did not

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show that the defendant set on foot any prosecution. Even if he wished to do it, the action of the justice prevented him. Even if there had been a prosecution on plaintiff's complaint, there was no proof that it had been ended. The order of the sessions would have shown only an ending, favorable to the plaintiff, upon the charge of conspiracy made by Hoese.

The judge below properly dismissed the complaint in this action, and the judgment appealed from should be affirmed with costs.

FREEDMAN, J., concurred.

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THE PRODUCE BANK OF THE CITY OF NEW  
YORK, PLAINTIFF, v. JOSEPH MORTON,  
LEON WEIL, ALPHONSE WEIL AND AUS-  
TIN BALDWIN, ASSIGNEES, &C., DEFENDANTS.

I. *NEW TRIAL.*

1. MOTION FOR, AT GENERAL TERM, UNDER § 268 OF  
THE CODE.

(a.) FINAL JUDGMENT, WHAT CONSTITUTES.

1. One setting aside a transfer as fraudulent and void, directing the transferee to account before a referee, thereby appointed, for all property and effects and proceeds thereof received or held by him under the transfer; directing the referee to examine the accounts and doings of the transferee and decide with what sums of money or property he is chargeable, and report thereon; further directing that within ten days after notice of filing the report the transferee, in case no exceptions are filed, or in case exceptions should be filed, then in ten days after the confirmation of the report, pay and deliver over all such moneys and property to a receiver thereby appointed; further directing that out of the proceeds of such property and moneys the receiver

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pay the plaintiff \$458.50 the amount of plaintiff's judgment against the transferors, with interest thereon, together with the costs of the action, and hold the residue, if any, to abide the further order of the court; and further directing *that any of the parties thereto might apply to the court for such other or further judgment or decrees as might be just*, CONSTITUTES A FINAL JUDGMENT.

Overrules in this respect the former decision in this case. 40 N. Y. Super. Ct. 328.\*

## II. COURT OF APPEALS.

### 1. DECISIONS NOT STRICTLY BINDING AUTHORITY, EFFECT OF.

(a.) A decision pronounced in the very case in hand, through the opinion of one of its distinguished judges, after careful consideration and cogent reasoning, is, although in strictness not binding authority, is *entitled to very great weight*.

Before SEDGWICK and SPEIR, JJ.

*Decided June 25, 1877.*

This action, in the nature of a creditor's bill, was brought to set aside an assignment for the benefit of creditors, and was tried in April, 1875, at special term.

The decision was in favor of the plaintiff, and on July 12, 1875, the findings of the court or decision

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\* After the entry of the judgment on the decision at the special term, defendants moved at general term for a new trial. The plaintiff on the argument of that motion insisted that it was not a proper case for such a motion. The motion was granted (40 N. Y. Super. Ct. 328). The plaintiff appealed to the court of appeals. That court dismissed the appeal, on the ground that the subject matter in controversy did not exceed \$500; but the learned judge who delivered the decision of the court in the course of his opinion considered the subject as to whether the case presented was a proper one for a motion at general term for a new trial, and came to the conclusion that it was not (1 Abb. New Cas. 174). Thereupon plaintiff moved at general term for a re-argument of the motion for a new trial, and the motion was granted (see *ante*, this volume, p. 124).

The foregoing opinion was delivered on the re-argument.

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Opinion of the Court, by SPEIR, J.

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were filed, whereby it was found that the assignment was void, and that a receiver should be appointed to take charge of such property and effects as should be found by a referee in the hands of the assignee, to which the plaintiff was declared to be entitled; and that the receiver should pay out of such property or effects to the plaintiff or its attorneys the costs of the action and the amount of the judgment of July 14, 1874.

Judgment was entered herein pursuant to such decision on July 21, 1875, in favor of the plaintiff.

The particular directions of the judgment are given in the head-notes.

The defendants filed exceptions to the findings, and made a motion for a new trial at general term, under section 268 of the Code, which was argued in December, 1875.

The motion was granted, and a new trial ordered by decision rendered January 3, 1876.

*D. J. Newland*, of counsel, and attorney, for plaintiff.

*Fransioli, Tilney & Mosher*, attorneys; *A. C. Fransioli*, and *J. F. Mosher*, of counsel, for defendants.

BY THE COURT.—SPEIR, J.—This is a motion of the defendants for a new trial on a case and exceptions under section 268 of the Code. The general term of this court, in 1875, granted the same motion then originally made, and the plaintiff appealed to the court of appeals. The appeal was dismissed for the reason that the amount in controversy was held by it to be under five hundred dollars.

The court, however, gave a full opinion.

It comes before this court again on a re-argument of the defendants' motion for a new trial, as originally made at the December term, 1875, after leave obtained

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Opinion of the Court, by SPER, J.

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on the application of the plaintiff to the January general term last.

The only question before the court now is, was the case properly before the general term, on this motion for a new trial, or should the defendants have appealed? On the part of the plaintiff it is claimed that it is not a case under section 263, and that the defendants' remedy was by appeal. If this position be correct, it is plain that the court could not, and did not obtain jurisdiction, or power to hear and determine the case on its merits.

The language of the Code, in section 268, is "that where the decision filed under section 267 does not authorize a final judgment, but directs further proceedings before a referee or otherwise, either party may move for a new trial at general term, and for that purpose may within ten days after notice of the decision being filed, except thereto, and make a case or exceptions as above provided in case of an appeal."

The point presented is sharply and clearly defined. Did the decision of the court below authorize a final judgment? If it did, then the defendants erred in bringing the case for review before the general term on a motion for a new trial instead of appealing.

The power of the general term and its jurisdiction to hear a motion brought before it for a new trial is derived exclusively under the provisions of section 268 as therein expressed, and can be applied only to the particular case coming under that section. The only power the court has to act at all upon such a motion is to dismiss it where, by the character of the decision of the special term, it is not and cannot be brought under the requirements of the section. Whether the judgment below was a final judgment between the parties in any case must depend upon this: Was there any further question or issue between them to be litigated? The plaintiff's right to be paid

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Opinion of the Court, by SPEIR, J.

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does not depend upon the result of the receiver's action, whatever that may be; nor does it depend upon the amount which may be in the assignees' hands. The right to recover through the agency of the receiver the judgment, a fixed and definite sum, with interest thereon, and the costs of the action, or so much thereof as the sum found will pay, has been finally determined by the judgment between the parties to the suit. "A judgment (defined by the Code, section 245), is the final determination of the rights of the parties in the action." The judgment itself neither in terms nor by the import of its provisions suggests the existence of any matter of further litigation between the plaintiff and defendants. This question was virtually decided by BOSWORTH, Ch. J., in *Gray v. Cook* (24 How. Pr. 432); where it was held that a direction that the plaintiff have judgment for a certain amount against the defendant as administrator, and that he pay said moneys into court, *to await the further order of the court, and to be distributed according to law, is a final judgment* against the defendant as between the parties (See also *Geery v. Geery*, 63 N. Y. 255).

The court of appeals have pronounced their views on the question in a full opinion. But the defendants claim that this opinion of the court on this point is not a binding authority on this court, as the appeal therein was dismissed. This in strictness is undoubtedly true. But as it is the decision of the court pronounced through the opinion of one of its distinguished judges in this very case after careful consideration and sustained by cogent reasoning, it seems to me to be entitled to very great weight. The court say:

"We are inclined to the opinion that this point is well taken, and that the judgment was final and reviewable by appeal. There was nothing left to be judicially determined. The amount of the plaintiff's

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claim was ascertained, judgment was rendered that the assignment be set aside, that the assignee deliver over the assigned property to a receiver, and that the plaintiff be paid out of the proceeds the amount of his claim and costs. This was a final disposition of the whole controversy, and no further judgment was to be rendered. The machinery of a reference and receivership was for the sole purpose of carrying the judgment into execution, and not the foundation of any further judicial action in the case."

The defendant's motion for a new trial must be dismissed with costs.

SEDGWICK J., concurred.

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MARSHALL IBBOTSON, PLAINTIFF AND RESPONDENT, v. JACOB A. SHERMAN, DEFENDANT AND APPELLANT.

I. *PERFORMANCE, SUBSTANTIAL, WHAT IS NOT.*

1. CONTRACT FOR PUBLISHING.

(a.) Where J. contracted with S. to insert a certain advertisement in 30 different newspapers for a period of one year in consideration of a certain sum to be paid quarterly in advance, and during the quarter for which suit was brought the advertisements was omitted in seven consecutive issues of one of the papers,

HELD

not a substantial compliance.

(1.) An inference springs from this that J. was either negligent or intentionally in fault.

II. *JUDGMENT ON REFEREE'S REPORT.*

1. REVERSAL ON QUESTIONS OF FACT.

(a.) In above case where a witness swore to the non-insertion in seven consecutive issues of one of the papers and produced the

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Statement of the Case.

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issues of the papers, and J. as a witness swore that he put the advertisement in 34 papers and that it was in all of them for 6 months to his own knowledge; but also swore that he himself had received the issues of but 20 papers and gave an unsatisfactory account as to the other 10; and the referee decided as matter of fact there was a substantial performance,

HELD

the evidence did not establish substantial performance, and the judgment should be reversed.

**III. RES ADJUDICATA.—JUDGMENT.**

**1. CONTRACT CALLING FOR PAYMENT BY INSTALLMENTS.**

**(a.) RECOVERY OF JUDGMENT FOR FIRST INSTALLMENT, EFFECT OF.**

1. *Conclusive* as to the validity of the contract.
2. *Also* as to matters necessary to be established to warrant the judgment for the first installment, and equally necessary as a foundation for the recovery of each of the other installments.

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

*Decided June 25, 1877.*

Appeal from judgment entered on report of referee.

The plaintiff as assignee of one Jacobs brought this action for three installments, alleged to be due by the defendant, under a contract. The first installment had been paid under the judgment hereafter referred to. The contract, made October 26, 1870, was that Jacobs agreed to advertise the defendant's card, "the same as now in Frank Leslie, in thirty papers for one year, with good notices once in six months, for six hundred dollars, to be paid quarterly in advance. Any of the papers failing to give the advertisement and the notices, others shall be used equally as good and desirable. The papers are the following," and their names were set down. The complaint alleged that a substituted list of papers, in number thirty, had been made under the agreement, and that advertisements



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Opinion of the Court, by SEDGWICK, J.

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had been inserted in them, in pursuance of said agreement.

The complaint also averred that said Jacobs commenced an action in the marine court, on January 27, 1871, for the recovery of the first two installments, in which action defendant appeared and answered; that a trial of said action was had, on which both parties introduced evidence as to whether there was any contract binding on the defendant, and if so whether the said Jacobs had performed the same; that in said action, said Jacobs recovered judgment in the marine court for \$300, and costs, being for the first two installments of \$150 each; that on appeal to the general term of the court of common pleas by the defendant, that court reversed the judgment so far as the same related to the recovery of the second installment only, on the ground that the action was prematurely brought therefor, but affirmed it as to the first installment; and that defendant has since paid the same.

The answer alleged that the agreement was not to be performed within one year, and was not signed by either of the parties, and was therefor invalid, void, and of no effect; it then admitted the commencement of the marine court action, and the recovery of the judgment therein as alleged in the complaint, and the payment thereof, and that the amount of the original judgment was reduced on appeal; and otherwise made a general denial.

The referee found for the plaintiff, for the second installment, and that the plaintiff's assignee had made substantial performance during the second quarter.

*H. M. Whitehead*, for appellant.

*S. S. Harris*, for respondent.

BY THE COURT.—SEDGWICK, J.—As the promise by defendant was to pay in advance, probably it was

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Opinion of the Court, by SEDGWICK, J.

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not material to the plaintiff's cause of action to aver that there had been performance of what his assignor had promised to do after the payment was to be made. The subsequent non-performance, if there were such, was to be pleaded by defendant, to show that the consideration had failed, or as a counter-claim. But on the trial, no regard was had to the pleadings, and the important question was whether the proof showed that plaintiff's assignor Jacobs had advertised for the second quarter as he had agreed.

On this question of fact, the referee found at first, that Jacobs had performed for the second quarter, but in answer to a request of defendant he found that "it was necessary for Jacobs to have made substantial performance during the second quarter, and that he did so perform." On looking at the testimony it will be found, that the points of non-performance, as proved affirmatively, were these, that during the second quarter one of the papers in the list had omitted the advertisement, in one of its issues, and another in seven consecutive issues. Perhaps an omission for one or two or three weeks, against a contract made by Jacobs with the papers, would be of such comparative unimportance that there might be said to be a substantial compliance, if that were the only omission. But when there has been no advertisement for seven weeks, the default is not trifling, but is important to the interests of the defendant, and from it springs the inference that Jacobs was negligent, or intentionally in fault. It is suggested that the proof did not show that the paper which was produced and which did not have the advertisement for seven weeks, was on the list. But this does not seem correct. The name of the paper as given by the witness is not on the list. The witness however swore that it was one of the list, and the papers were introduced in evidence. It was probably the fact that the witness made a verbal slip.

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Statement of the Case.

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Coupled with this direct evidence, Jacobs, as a witness, failed to prove that the advertisement had been in all the papers. Although he swore on his direct examination that he put the advertisement in thirty-four papers, and that it was in all of them for six months to his own knowledge; yet he also swore that he had received himself the issues of but twenty papers, and gives an unsatisfactory account as to the other ten. It is clear that he had seen only a part of these ten occasionally, and some he had not seen at all. To me, the evidence does not show that there was a substantial performance, and for this reason the judgment should be reversed.

The judgment in the marine court, as admitted by the pleading, established the existence and validity of the contract, and also that the second list of papers had been competently substituted for the first.

The form of the so-called "notices" and their situation as advertised by Jacobs was sufficient.

The judgment should be reversed, a new trial ordered, and the order of reference vacated, with costs to appellant to abide the event.

SPEIR and FREEDMAN, JJ., concurred.

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**FREDERICK LAW OLMSTEAD, PLAINTIFF, v.  
THE MAYOR, ALDERMEN AND COMMON-  
ALTY OF THE CITY OF NEW YORK, DE-  
FENDANTS.**

**I. OFFICE, OFFICER, EMPLOYEE.**

**1. DEFINITION AND DISTINCTIONS.**

(a) OFFICE. It is a right to exercise a public function or employment, and take the fees and emoluments belonging to it. It involves the idea of tenure, duration, fees or emoluments, and

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Statement of the Case.

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powers as well as that of duty. It implies an authority to exercise some portion of the sovereign power of the State, either in making, administering or executing the laws.

(b) OFFICER. One who holds an office.

(c) EMPLOYEE. One who receives no certificate of appointment, takes no oath of office, has no term or tenure of office, discharges no duties, and exercises no powers depending directly on the authority of law, but simply performs such duties as are required of him by the persons employing him, and whose responsibility is limited to them, is not an officer and does not hold an office.

1. *This although the persons so employing him are public officers, and his employment is in and about a public work or business.*

## II. APPLICATION.

1. *Landscape architect* employed by the Department of Public Parks, does not hold an office, and *is not an officer* within the meaning of the 114th section of chap. 335 of the Laws of 1873.

Before SEDGWICK and SPEIR, JJ.

*Decided June 25, 1877.*

This case comes up on plaintiff's motion that this court direct a judgment to be entered upon a verdict rendered in favor of the plaintiff, subject to the opinion of the general term. The plaintiff sued to recover the salary alleged to be due him as landscape architect of the Department of Public Parks from May 31, 1876, to July 31, then next, inclusive.

The plaintiff was by profession a landscape architect, and had been employed many years in that capacity by the Department, which had fixed his salary at the rate of \$6,000 per annum, and he had been paid at that rate down to and including May 31, 1876.

In the year of 1876 (*Laws of 1876*, p. 196, ch. 193), the legislature created a board known as the "Commissioners of the State Survey," to hold office for one year, and named the plaintiff one of the commissioners.

He accepted the office of commissioner and took the oath of office May 31, 1876. He afterwards, on July 18, 1876, resigned. During the time he held the office

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Plaintiff's points.

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of commissioner he, without interruption, performed the duties and rendered the services devolved upon and required of him as landscape architect. On August 4, 1876, the Department of Parks passed the resolution referred to in the opinion, whereby it was resolved "that an allowance or payment be made to him" (the plaintiff) "for the services to the Department from May 31, 1876, at the rate of \$6,000."

*Smith E. Lane*, attorney, and *A. J. Vanderpoel*, of counsel for plaintiff, urged:—I. The plaintiff was not an officer within the prohibition of section 114 of the charter of 1873. 1. He did not hold any *office* under the charter. 2. He was an employee or servant of the Department of Public Parks, having no official relations whatever to the city government. 3. The charter throughout maintains this distinction between employees and officers (§§ 93, 94, 95, &c.; *Holly v. Mayor, &c. of N. Y.*, 59 *N. Y.* 166; *Stone v. U. S.*, 3 *Court of Claims*, 260; *Sullivan v. Mayor, &c. of N. Y.*, 48 *How. Pr.* 239; *Sullivan v. Mayor, &c. of N. Y.*, 53 *N. Y.* 652, reported in full in 47 *How. Pr.* 491; *Commonwealth v. Binns*, 17 *Serg. & Rawle*, 219; 3 *Greenleaf*, 481). IN THIS CASE, AND IN BACON'S ABR. TITLE OFFICER, A DEFINITION OF AN OFFICE AND OFFICER IS GIVEN WHICH EXCLUDES THE CASE AT BAR.

II. If plaintiff, as landscape architect, shall be deemed to be a city officer, and hence, by his acceptance on May 31, 1876, of the office of a commissioner of the State survey, to have ceased to be such architect, he may still recover for his services rendered at the request of the department of parks for defendants' benefit, by virtue of the resolutions of August 4, 1876, passed by the commissioners of the department. 1. They had a right to receive such services under the general powers conferred by sections 23 and 83 of the charter. 2. The resolutions of August 4 were a rati-

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 Defendants' points.
 

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fication of plaintiff's employment, and legally made so. The doctrine of ratification applies to municipal corporations (1 *Hoff. Laws*, 330; *Peterson v. Mayor*, 17 *N. Y.* 449; *Brady v. Mayor*, 20 *Id.* 312; *In the Matter of Doubleday v. Supervisors of Broome County*, 2 *Cow.* 533; *Thompson v. Mayor*, 7 *Robt.* 543; *Langdon v. Castleton*, 30 *Vt.* 285; 1 *Dillon's Mun. Corp.* § 168, and cases in notes, §§ 168, 169, 170, 171). 3. Here there is no illegal contract to contend against. *Nelson v. The Mayor*, 2 *W. Dig.* 313, is therefore in point: "Where the city has received property there is, independent of contract, an implied obligation to pay its value." 4. There remains but the question "what were plaintiff's services during the 31st of May, and June, and July, 1876, reasonably worth." This sum plaintiff should recover. The value of these services is not disputed.

III. The defense interposed cannot avail after the date of the resignation of plaintiff, viz., July 18, 1876. 1. Failure to fix his compensation was cured by the resolutions of August 4, 1876, referred to in the complaint, and admitted. There is no law which requires the pay of an employee to be fixed in advance.

*W. C. Whitney*, counsel to the corporation, and *Francis Lynde Stetson*, of counsel for defendants, urged:—I. The plaintiff, as landscape architect, in the department of public parks, was "a person holding office," and his position was an "office under the city government" within the meaning of section 114 of chapter 335 of the Laws of 1873 (*Ryan v. Mayor, &c. of New York*, MS. opinion of Judge FREEDMAN, delivered in the superior court, Nov. 11, 1875; *Davenport v. The Mayor, &c. of New York*, 2 *T. & C.* 536; affirmed by the court of appeals; *Henly v. Mayor of Lyme*, 5 *Bing.* 91-107; *Wood's Case*, 2 *Cow.* 30, n.). THE LAST TWO CASES GIVE A DEFINITION OF AN OFFICE, WHICH WILL INCLUDE THE CASE AT BAR (*People v.*

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Defendants' points.

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Hayes, 7 *How. Pr.* 248 ; Sweeny v. Mayor, &c. of New York, 5 *Daly*, 274 ; affirmed, 58 *N. Y.* 625 ; Costello v. Mayor, &c. of New York, 63 *Id.* 48 ; People v. Van Nostrand, 46 *Id.* 381).

II. The case of Sullivan v. The Mayor, &c. of New York, 53 *N. Y.* 652, reported at large in 47 *How. Pr.* 491, has by above cited authorities been so limited as to be inapplicable to the case at bar.

III. Applying the doctrine of these cases to the position held by the plaintiff, it seems impossible to consider him a mere servant or employee. He was the landscape architect of the Central Park, a position of dignity in its duties and emoluments. He designed most of the work of the Park ; had general supervision of those engaged in carrying it on ; and discharged a great variety of miscellaneous duties. His position, therefore, was one supremely important to the maintenance and extension of the great public work with which he was connected. The original execution of all that made the place a park was confided to his artistic sagacity and discretion. The whole machinery and system of the Central Park had its being and operation solely according to his designs and direction. If the enterprise itself was of a public character it seems impossible to deny that its originator, designer and artistic director was a public officer. The construction and maintenance of this magnificent public park is certainly a public undertaking as much as is the construction of the highways.

IV. The expression of the legislature and the courts alike have demonstrated that the defendants attribute the proper signification to these words. (a) *As to the Legislature* : By section 21 of chapter 757 of the Laws of 1873, the section of the chapter under consideration was amended as follows : " Section 114 of said chapter shall not be construed to apply to civil or consulting engineers who may be employed to superin-



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Opinion of the Court, by SPEIR, J.

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tend any specific work on the part of the City of New York." Under the operation of the maxim "*Expressio unius est exclusio alterius*" the effect of the legislative exception of one class of employees was to leave all others under the operation of the charter rule. If it was necessary to specifically except civil and consulting engineers employed on specific works, why was not the landscape architect bound in absence of any such release? (b) *As to the courts*: The decision in the case of *Davenport v. The Mayor* (*supra*), arising upon this very section, is directly in point.

V. The plaintiff accepted, held and retained a civil office of honor and trust under the government of the State from the 30th day of May to the 18th day of July, 1876. This was an "*office*," and involved his taking the oath prescribed by the constitution.

VI. From the thirty-first day of May, when he vacated his office, until the fourth day of August, 1876, when he was re-appointed, the plaintiff was not entitled to compensation for his services. It was not enough that he should render services, but it was necessary also that they should be rendered by the officer designated for that purpose. Neither was it in the power of the board to vote away the salaries of the department to any persons other than those holding office under it.

BY THE COURT.—SPEIR, J.—A preamble adopted by the department of parks on the 4th of August, 1876, is set forth in the complaint, reciting that the plaintiff had, without advice as to the effect it might have on his position as landscape architect, accepted the office of commissioner of the State survey; that some doubt had been expressed on the point, and that he had resigned the office, and had without interruption performed the services on which he was employed, and it was resolved that an allowance and payment be made to him for the services to the department, from the 31st day of May, 1876, at the rate of \$6,000.



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Opinion of the Court, by SPENCER, J.

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No salary or compensation was attached to the office of commissioner of the State survey. The plaintiff took the oath of office on the 31st of May, 1876, and the board was organized.

The defense is based upon the following provision of section 114 of chapter 335 of the Laws of 1873: "Any person *holding office*, whether by election or appointment, who shall, during his term of office, accept, hold or retain any other civil office of honor, trust or emolument, under the government of the United States (except commissioners for the taking of bail, or register of any court) or of the State (except the office of notary public or commissioner of deeds, or officer of the national guard), or who shall hold or accept any other office connected with the government of the city of New York, or who shall accept a seat in the legislature, shall be deemed thereby to have vacated *every office* held by him under the city government. No person shall hold two city or county *offices*, except as expressly provided in this act; nor shall any *officer* under the city government hold or retain an *office* under the county government, except when he holds such office *ex-officio*, by virtue of an act of the legislature; and in such case he shall draw no salary for such *ex-officio* office."

Was the plaintiff, a landscape architect in the Department of Public Parks, an officer within the prohibition of the preceding section?

An *office* has been defined to be a right to exercise a public function or employment, and to take the fees and emoluments belonging to it. An *officer* is one who is lawfully *invested* with an office (Bacon's Abridgment, vol. 7, title *Office* and *Officer*, p. 279, ed. of 1860; Bouv. Law Dic.). The idea of an officer clearly embraces the idea of tenure, duration, fees or emoluments, and powers, as well as that of duty. The nature of the power and the control over the officer appointed does not at all depend upon the source from which it eman-

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Opinion of the Court, by SPEER, J.

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ates. The execution of the power, and the control over the officer, depends upon the authority of law, and not upon the agent who is to administer it. The tenure of ancient common law offices, and the rules and principles by which they are governed, have no application in this country. In England the tenure of office depends in a great measure upon ancient usage. Here there is no ancient usage which can apply to, and govern the tenure of officers created by the constitution and laws. In such a case the tenure of the office is determined by the meaning of the statute. Every office under the constitution implies an authority to exercise some portion of the sovereign power of the State, either in making, executing or administering the laws. In the section of the statute there is no ambiguity, and there is no room for construction or interpretation. The words are clear and explicit: "No person shall hold two city or county offices, except as provided in this act; nor shall any officer under the city government hold, or retain an office under the county government, except when he holds such office *ex-officio*, by virtue of an act of the legislature; and in such case he shall draw no salary for such *ex-officio* office." The distinction is plainly taken between a person acting as a servant or employee, who does not discharge independent duties, but acts by direction of others, and an officer empowered to act in the discharge of a duty, or trust, under obligations imposed by the sanctions and restraints of legal authority in official life. I can find nothing in all the sections of the charter which does not strictly limit the prohibition to persons included in the foregoing definition given by the elementary writers. The plaintiff received no certificate of appointment—took no oath for the faithful performance of duties—had no term or tenure of office—discharged no duties, and exercised no powers depending directly upon the authority of law. He was simply the servant of the commissioners

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Opinion of the Court, by SPEIR, J.

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of the park, and responsible only to them. His responsibility was limited to them, and is in no way distinguishable from that of the carpenter and the mason who are employed to build the bridges or erect the buildings designed by the architect. The nature and dignity of the duties confided to the employees by the commissioners do not determine the character of the position. It is in no proper sense official according to any sense in which the term is used in the statute above recited.

The justices of the supreme court of Maine, 1822, gave an opinion as to whether certain duties which had been delegated by agents to be appointed by the governor, constituted the appointees officers. The case is reported in the appendix to the first edition of 3 *Greenleaf App.* No. 2. They say, "There is a manifest difference between an office and an employment under the government. We apprehend that the term 'office' implies a delegation of a portion of the sovereign power to, and possession of it by, the person filling the office, and the exercise of such power within legal limits constitutes the correct discharge of the duties of such office." The question was directly put before the learned judges for decision, and they returned a sharply defined answer, wholly disconnected with other matter, and it seems to me to be conclusive. The courts in this State are in accord with the foregoing opinion.

The plaintiff must have judgment for the amount claimed in the complaint, with costs.

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SAME v. SAME.

THE COURT.—This case comes within the decision of the foregoing, and must be controlled by the same principles of law.

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Statement of the Case.

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The plaintiff is entitled to judgment for the amount of the verdict, with costs.

SEDGWICK, J., concurred.

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JAMES P. KERNOCHAN, *et al.*, TRUSTEES, &CO.,  
PLAINTIFFS, v. WALTER R. WHITING, DE-  
FENDANT.

I. LEASE.

1. ASSIGNMENT OF, WHEN PRESUMED.

(a.) A lease was made to A., who formed a copartnership with B. for a term exceeding the demised term, and the firm occupied a part of the demised premises (the rest having been sub-let by A. before the partnership with B.) until November 18, 1875, when it was dissolved. The firm paid the rent up to November 1, 1875. On the dissolution, by arrangement between the partners, all debts owing to the firm were to be received by B., and all demands against it were to be presented to him for payment. B. gave public notice of this, and also that the business would be conducted in the name of B. at the demised premises. B. remained in the occupancy of the portion of the demised premises previously occupied by the firm, until February 1, 1876, when he was dispossessed. B. collected of the sub-tenants to whom A. had sublet, the rents for their respective premises up to February 1, 1876, and deposited them in bank to his individual account. The lease to A. contained a clause against under-letting without the written consent of the lessors. No consent was given to under-let to B.

HELD ;

in an action by the lessors to recover from B. the quarter's rent falling due February 1, 1876, the above facts appearing without contradiction, *that he was holden as assignee.*

Before SPEIR and FREEDMAN, JJ.

*Decided June 25, 1877.*

The plaintiffs leased the premises No. 296 Broadway, New York, for two years from May 1, 1874, to

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Defendant's points.

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William H. Ward, for \$8,000 a year, payable quarterly on the usual quarter days.

On July 30, 1875, Ward entered into partnership with the defendant under the firm name of Ward, Dickson & Co., which was to continue by the partnership agreement for one year from August 10, 1875. The business of the firm was carried on at the premises, occupying the first floor of the store and part of the cellar. Ward had, prior to the formation of the partnership, sub-let the remainder of the building, and the tenants were in occupation when the defendant came in. The rent was paid by the firm up to November 1, 1875.

The partnership of Ward, Dickson & Co., was dissolved November 18, 1875. The notice of dissolution provided that all debts owing to the partnership were to be received by the defendant, and all demands against the partnership were to be presented to him for payment. The defendant remained in possession of the premises until after February 1, 1876, when he was ejected by the plaintiffs. The action is brought to recover the quarter's rent from November 1, 1875, to February 1, 1876. Additional facts appear in the opinion.

A verdict was directed for the plaintiffs, exceptions to be heard in the first instance at general term.

*G. W. Lockwood*, attorney, and of counsel for defendant, on the point on which the court rests the case, urged :—The lease was never assigned, nor any part of it. To render the defendant liable as assignee of the lease it must appear that the whole term of the lease was assigned (*Davis v. Morris*, 36 *N. Y.* 569 ; *Bedford v. Terhune*, 30 *Id.* 453 ; 27 *How. Pr.* 472 ; affirming 1 *Daly*, 371). Ward never had any conversation with Whiting about the rent before he became his partner, and then no particular conversation. Nor was there any agreement about the rent, except such as is contained in the copartnership articles. The copartner-

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Plaintiffs' points.

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ship articles show that Whiting (the defendant) agreed to pay one-half the rent of the first floor and part of the cellar to Ward. That is the only liability Whiting (the defendant) assumed. There is not a particle of evidence showing an assignment of the lease by Ward to Whiting (the defendant). There was no agreement, except such as is contained in the copartnership articles: "No other agreement at all."

II. There was no privity of contract between the plaintiffs and defendant (42 *N. Y.* 201; 42 *Id.* 316; 15 *Id.* 374).

*Man & Parsons*, and *W. M. Man*, of counsel, for plaintiff, on the point on which the court rests the case, urged:—I. The defendant is liable for this quarter's rent as assignee, as alleged in the complaint, in which it is expressly alleged that the defendant became assignee and successor of said Ward in regard to said lease and the possession of said premises. No objection is taken that Ward is not joined as a party defendant, which objection must be taken by answer, if at all. The plaintiffs bring themselves, by their evidence, clearly within the doctrine of the case of *Bedford v. Terhune*, 30 *N. Y.* 453; which case has never been overruled or modified. We have proved the lease to Ward; we have proved his entering into partnership with the defendant under the firm name as above, and their joint occupancy of the premises; we have proved the payment of rent by that firm for the quarter ending November 1; the subsequent dissolution of the firm; the defendant taking all the assets and agreeing to pay the debts; his subsequent occupancy of the premises during the quarter in question; his collection of the rents from the sub-tenants, and appropriation thereof to his own use, and the notice by him that the business would be conducted in his individual name, as successor of the firm. The presumption is, under the

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Opinion of the Court, by SPEIR, J.

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case of Bedford v. Terhune, of an assignment from Ward to the defendant, as alleged in the complaint. The burden is thereupon thrown upon the defendant of proving in what capacity he occupied the premises. No such proof was given. No question of fact was requested by defendant's counsel to be sent to the jury, and the learned judge who tried the case was justified in directing a verdict for the amount claimed, and interest.

BY THE COURT.—SPEIR, J.—The action is brought to recover the quarter's rent from November 1, 1875, to February 1, 1876, alleging that defendant became the assignee of Ward. The complaint contains a separate allegation that the defendant was liable to pay the quarter's rent to the plaintiffs, by reason of his use and occupation. The answer admits the making of the lease, that Ward entered into possession of the premises, and the demand for rent. It denies every other allegation.

If the defendant is liable for the rent to the plaintiffs, in either of the above characters, the judgment appealed from should be affirmed. The premises in question must have been occupied by the defendant, either as sub-lessee of Ward, or as his assignee of the term, or as tenant of the plaintiffs. By the terms of the lease, Ward covenanted with the plaintiffs not to let or under-let the premises, without the written consent of the plaintiffs; and no such consent is claimed. Privilege was given to sub-let part of the store. There was no agreement to under-let proven, nor is there any fact proved by which an under-letting could in fairness be inferred. It is not to be presumed that Ward and the defendant would transfer the lease, or the term, in such a way as to cause a breach of the express covenant, if by any other mode possession could be acquired by the defendant without producing such a result.



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Opinion of the Court, by SPEER, J.

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The action for use and occupation is founded upon contract, and lies only when the relation of landlord and tenant exists. Such relation does not appear in the case. The power to occupy and enjoy must be given by the landlord to the tenant. The defendant's power was derived from Ward, the lessee, who held the unexpired lease from the plaintiffs. The presumption upon the facts proved would be that the transfer to the defendant was by assignment and not by under-letting. The defendant by arrangement held for the whole residue of the term, and his partnership agreement with Ward extended beyond the term (*Davis v. Morris*, 36 *N. Y.* 569). The business of the firm was carried on at the premises, and the rent was paid by the firm to the plaintiffs up to November, 1875. The partnership was dissolved on the 18th of said November. The notice of dissolution provided that all debts owing the partnership were to be received by the defendant, and all demands against it were to be presented to him for payment. Appended to this notice was the following: "The business will be conducted in the name of Walter B. Whiting," the defendant, "as successor to Ward, Dickson & Co., at 296 Broadway, New York City," being the demised premises. The defendant remained in possession of the premises until February 1, 1876, when he was ejected by the plaintiffs, and for the same reason as the lessee could have been ejected, had he continued in possession and failed to pay. The defendant had collected the rents from the sub-tenants who had been put into possession of parts of the store by the lessee, including the quarter's rent for which this action was brought, and put the money in bank to his own individual account.

When the transfer is for the whole term the person taking is an assignee and not an under-tenant, although there is a formal under-letting. "The ordinary distinction between an assignment and an under-lease is, that



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Opinion of the Court, by SPEER, J.

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the former transfers the land for the whole term, the latter for only a part of it'' (1 *Hilliard's Abridgment*, 126, § 55).

It being shown that the defendant occupied the whole of the unexpired term of the lease to Ward, or could have done so by his arrangement with Ward, in the same manner as Ward could, by paying rent to the plaintiffs, the fair presumption is that he entered for the whole unexpired term, and as such interest is given, not by an under-lease but by an assignment, the further presumption must be that the defendant was in as assignee, and not as under-tenant. If he was in as under-tenant, he would not be liable to the plaintiffs for rent, either in an action on the lease, or for use and occupation (*Woodfall's L. & T.* 358; 1 *Chitty Pl.* 36).

The evidence clearly established a *prima facie* case of an assignment to the defendant of the term. If there was, in fact, no assignment, the defendant could not be made liable. But as the law infers an assignment from certain facts proved, the inference must be of a valid operative assignment, sufficient to transfer the term. The *onus* was on the defendant to prove either that there was no assignment, or that it was void in law. Instead of making such proof, he rests upon the case as made by the plaintiffs, and as the case made fixes his liability, he should not complain (*Bedford v. Terhune*, 30 *N. Y.* 454). Although there are dissenting opinions in this last case, the law, as settled, seems not to have been disturbed.

The defendant's exceptions must be overruled, and the plaintiffs must have judgment upon the verdict, with costs.

FREEDMAN, J., concurred.

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Statement of the Case.

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CHARLES KNOX, PLAINTIFF AND RESPONDENT, v.  
DAVID HEXTER, DEFENDANT AND APPELLANT.  
ACTION No. 1.\*

DAVID HEXTER, PLAINTIFF AND APPELLANT, v.  
CHARLES KNOX, DEFENDANT AND RESPOND-  
ENT. ACTION No. 2.\*

**I. EXECUTION.**

1. STAY OF, TO ENABLE THE JUDGMENT-DEBTOR IN A CROSS ACTION BROUGHT BY HIM AGAINST THE JUDGMENT CREDITOR, TO RECOVER JUDGMENT SO AS TO OFFSET IT AGAINST THE JUDGMENT ON WHICH THE EXECUTION IS ABOUT TO BE ISSUED.

(a) POWER OF THE COURT TO GRANT.†

1. It has such power.

(b) EXERCISE OF POWER, WHEN.

1. Where the party against whom the stay is asked is protected and secured, while the other is in peril and exposed to loss, and the subject matters of the two actions are such as justly call for a settlement without further trial of issues of fact, and the effect of the order will be to finally adjust the rights of the parties without gaining advantage or suffering harm from the fact that one judgment is prior in point of time to the other, *a proper case for the exercise of the power is presented.*

Before SPEIR and FREEDMAN, JJ.

*Decided June 25, 1877.*

Appeal from an order staying execution in second above-entitled action.

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\* For principal cases, see 39 *N. Y. Superior Court Reports*, 109; 42 *Id.* 4.

† In the case at bar both actions were in the same court. The opinion of the court, however, does not seem to regard the circumstance as having any bearing on the question of the power of the court.

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Statement of the Case.

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It seems proper, with a view to giving all the facts upon which the decision of the court is based, to particularly set forth the stipulations referred to in the opinion, and the facts out of which they arose.

After judgment had been entered on the verdict, in Knox v. Hexter, defendant appealed to the general term and obtained an *ex parte* order staying plaintiff's proceedings. On a motion to vacate this stay, it appeared that judgment had been recovered by the plaintiff, in the case of Hexter v. Knox; that defendant had appealed from that judgment to the general term, where it had been affirmed, and an appeal from the general term decision to the court of appeals was pending, and thereupon the court, on denying the motion to vacate, required Hexter to enter into the following stipulation:

"It is stipulated by the defendant above named, that the judgments in the action heretofore brought by the present defendant against the present plaintiff, now pending on appeal in the court of appeals, have not been assigned or incumbered by him, nor has either of them; and that he will not hereafter make or execute any assignment or incumbrance thereon, by which the right of the plaintiff, if any, to offset the amount of the judgment in this action against the amount of the said judgments recovered by him against the said Knox, should be defeated or impaired."

"Dated November 8th, 1875."

After this, Knox was about to foreclose a chattel mortgage, given to secure another quarter's rent falling due since that sued for in Knox v. Hexter.

Thereupon Hexter commenced an action in the supreme court against Knox, and obtained an injunction against said foreclosure.

Thereafter, the following stipulation was entered into:

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Statement of the Case.

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SUPERIOR COURT OF THE CITY OF NEW YORK.

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DAVID HEXTER

*against*

CHARLES KNOX.

*Judgment for  
Plaintiff,  
\$18,163.18.  
Docketed May  
15, 1874.*

“The above-mentioned judgment having (on the appeal therefrom by said Knox) been affirmed by the court of appeals, it is stipulated and agreed between the parties to this action that the quarter’s rent of the Prescott House premises, due on the first day of November last from said Hexter to said Knox, with interest to this date, amounting to five thousand seven hundred and eighteen 96-100 dollars, shall be allowed as an offset against the said judgment in this action.

“And the said Knox having this day paid the sum of seventy thousand one hundred and forty-six 36-100 dollars in cash, on account of said judgment and costs of appeal therein, leaving a balance of principal and interest due thereon amounting to seven thousand and seven hundred and eleven 71-100 dollars,\* it is stipulated and agreed (the sureties for said Knox consenting) that no proceedings shall be taken under said judgment to enforce payment of the said balance, or the interest to accrue thereon, until the expiration of thirty days after the entry of judgment on an appeal now pending to the general term of this court, from a judgment recovered by said Knox against said Hexter for the sum of seven thousand and five hundred and fifty-seven dollars and forty-one cents, on October 9, 1875; and that if said Hexter shall, within said thirty days, commence an appeal to the court of appeals from

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\* The interest on above judgment of \$18,163.18 amounted to \$2,157.90, and the costs on appeal to general term and court of appeals to \$255.95.

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Statement of the Case.

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the judgment of said general term on the appeal now pending, all proceedings on the aforesaid judgment in this action shall be further stayed until the decision of the court of appeals on such last mentioned appeal; but no security shall be required from said Hexter, except an undertaking in the sum of five hundred dollars, the balance of the judgment in this action left unpaid, pursuant to this stipulation, being deemed and taken to be in lieu of all security which might be required from said Hexter to obtain a stay of proceedings on the appeal now pending from the said judgment against him, or on any appeal thereon to the court of appeals.

“In the case of the decision of said appeals being in favor of said Knox, then the balance of the aforesaid judgment against him now left unpaid is to be accepted in discharge of his judgment against said Hexter and interest thereon, and both of said judgments to be satisfied and discharged; and in case the judgment against said Hexter shall be reversed, he shall be at liberty to collect and recover said balance from said Knox and his said sureties, together with interest thereon. All other actions and proceedings now pending between said Knox and said Hexter are to be discontinued, without costs to either party.

“Dated New York, January 26, 1876.

“BUCKHAM, SMALES & WALKER,  
“DAVID HEXTER. Plaintiff's Attorneys.

“W. McDERMOT,  
“C. KNOX. Defendant's Attorney.”

The sureties given by Knox on his appeals to the general term and court of appeals consented to this stipulation.

On the execution of this stipulation Knox surrendered and cancelled his chattel mortgage, which he swore he would not have done if he had not understood and believed that by the stipulation all proceedings by

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Appellant's points.

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both parties were intended to be stayed until determination by the court of appeals in the action commenced by him, of his right to recovery of the judgment entered in his favor, no matter whether the appeal to the court of appeals was required to be taken by Hexter or himself.

*Buckham, Smales and Walker*, attorneys, and *Stephen A. Walker*, of counsel, for appellant, urged :—  
I. The justice cites *Chitty Pr.* vol. 1, p. 667, as sole authority for the proposition that though a common law court cannot set off unliquidated claims against a judgment, it can stay execution upon a judgment with a view to enable a defendant to obtain a judgment in a cross action. The proposition in *Chitty* is not supported by the authority of the single case cited in support of it, *Masterton v. Malin* (7 *Bing.* 435). Mr. *Chitty's* interpretation of the decision of the case is as follows: "The court will sometimes even stay execution in an action till judgment has been obtained by the defendant therein, viz., a cross action, so as to enable the latter afterwards to obtain such set-off." *Fisher and Harrison* (*Dig.* 7,774) state the same case in the following language: "A plaintiff having been nonsuited and costs taxed for defendant, the court refused to allow the plaintiff to set them off against costs to be taxed for him in an ejectment in which he had obtained a verdict, but which defendant had obtained a rule *nisi* to set aside and enter a nonsuit." With two directly counter interpretations of the same case, and with Judge *SEDGWICK's* citation of it as sole authority for his decision in the present case, it is well *petere fontes*—and see the case itself, which will be found to be a mere practice motion, and not stated with absolute correctness by any of the learned gentlemen. Whatever else it is, it is not the slightest authority for the position taken by its latest interpreter. Its remoteness and

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Appellant's points

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obscurity is sufficient evidence that cases which support the view taken in the order appealed from are difficult to find.

II. But if there were authority for such a ruling, Mr. Knox is in no position to claim this relief. He withdrew the counter-claim (the subject-matter of *Knox v. Hexter*) at the last moment of the trial in *Hexter v. Knox*. The opportunity of adjudicating all matters in controversy by one verdict he voluntarily repudiated nearly three years ago. This course on his part precludes him from asking relief from the consequences of his desire to continue rather than end litigation.

III. The court, however, has undertaken to make, by an order, what is in effect a judgment in an injunction suit upon a misconstruction of a private agreement between the parties, viz., the stipulation. Such action by a common law court is without jurisdiction. Further than this, the interpretation of the instrument is erroneous. The stipulation provides that no proceedings shall be taken by Hexter to enforce payment of the balance left in Knox's hands until the expiration of thirty days from the determination of the appeal to the general term; and that, if Hexter shall appeal therefrom to the court of appeals, proceedings shall be further stayed until the decision of the court of appeals. And it also expressly provides that the balance of the judgment against Knox is to be in lieu of all security which might be required from Hexter to obtain a stay of proceedings in two cases: 1st. On the appeal then pending in the general term. 2nd. On any appeal by Hexter thereon to the court of appeals. Also, that in case the judgment against Hexter is reversed he shall be at liberty to collect and recover said balance from Knox and his sureties. The judgment being reversed, Hexter is entitled to collect the balance.

IV. The whole tenor of the stipulation shows the balance left in Knox's hands was a mere substitute for

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Respondent's points.

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the statutory undertakings which would have been required by Hexter on his appeal to the general term, and in case of a decision adverse to him in that appeal, in lieu of a similar undertaking on appeal by him to the court of appeals. There is not a single expression or word in the stipulation giving Knox any right to retain the money in case of an appeal by him; such an appeal is not even referred to in the stipulation, and it is not competent to the court to delay Hexter's proceedings by a forced construction not warranted by the agreement of the parties. There is now no judgment against Hexter, and he is entitled to collect the balance due to him from Knox.

*Wm. McDermott*, attorney, and *John M. Scribner, Jr.*, of counsel for respondent, among other things, urged:—I. Nothing contained in the stipulation precluded Knox from making the application which he made at special term. There was a distinct provision for *two* appeals by Hexter; and although, by its precise terms, it does not appear to guard against the contingency of a *reversal* of Knox's judgment at the general term, yet, *as a whole*, the stipulation was manifestly intended to create an *armistice* until the court of appeals should decide whether Knox was entitled to his quarter's rent, after the *verdict* obtained by Hexter in the other case, which, at the general term of this court, and in the court of appeals, was upheld as an *indemnity* to which Hexter was entitled, for want of possession of the demised parts of the new buildings.

II. Even if it should come to the conclusion that the stipulation, in its strict language, is not broad enough to cover the appeal by Knox, the court, for the promotion of justice, should not hesitate to reform it, or give it such an equitable construction as will prevent injustice, especially in a case where no harm can result to the appellant. Knox has exhibited confidence in



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Opinion of the Court, by SPEIR, J.

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the merits of his suit *by giving stipulation for judgment absolute, if he is defeated on appeal*, and he ought not to be denied the benefit of such appeal, which would be the effect of a reversal of Judge SEDGWICK's order, in view of the alleged (and substantially undisputed) want of responsibility on the part of Mr. Hexter. It was sufficient at special term, and is sufficient now, to maintain the order, that the undisputed facts disclosed that Hexter was protected and *secured*; that Knox, on the contrary, was in *peril*. Justice and equity, therefore, required the interposition of the court, to the end that neither party should be allowed an unjust advantage.

III. The court has power to grant the stay (*Ferry v. Roberts*, 15 *How. Pr.* 65; *Durkin v. Vanderburgh*, 1 *Paige*, 622; *People v. N. Y. Com. Pleas*, 13 *Wend.* 649; *Baker v. Hoag*, and *Macy v. Stott*; 6 *How. Pr.* 201; *Smith v. Towden*, 1 *Sandf.* 696; *Cole v. Grant*, 2 *Caines*, 105; *Dewy v. Bower*, 3 *Johns.* 247). Assignment does not cut off the right (*Chamberlain v. Day*, 3 *Cow.* 353; *Insurance Co. v. Power*, 3 *Paige*, 365; *Graves v. Newsbury*, 4 *Hill*, 559). Equities between the parties are paramount to attorney's lien for costs (*Roberts v. Carter*, 24 *How.* 44; *Mohawk Bank v. Burrows*, 6 *Johns. Ch.* 317; *De Figaniere v. Forrey*, 2 *Robert.* 670; *Nicoll v. Nicoll*, 16 *Wend.* 446; *Brooks v. Hanford*, 15 *Abb. Pr.* 342).

BY THE COURT.—SPEIR, J.—The defendant Hexter appeals from an order staying his proceedings to collect by execution the unpaid balance of a judgment recovered by him against Mr. Knox, which was left unpaid under a stipulation between the parties.

Hexter first obtained a judgment for damages for being kept out of possession of certain leased premises. Knox shortly after procured his judgment against Hexter for rent of the premises, part of which he had

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Opinion of the Court, by SPEER, J.

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not put into the possession of Hexter. This latter judgment has been reversed by the general term, on the ground that Hexter is liable only for the use of that part of the premises actually occupied by him, but is liable for the part so occupied. Knox has appealed to the court of appeals, and given a stipulation for judgment absolute if he be defeated on appeal, claiming to be entitled under the lease to a quarter's rent. Should Hexter be allowed to collect from Knox the balance of his judgment under the decision of the trial term, he would still owe Knox for use of the premises actually occupied by him, even though Knox should not be entitled to recover the full quarter's rent. Knox ought not to be denied the benefit of such appeal which would result from the order made at special term, and especially so in view of the alleged want of responsibility on the part of Mr. Hexter. It is therefore sufficient to sustain the order by the facts disclosed that Hexter was protected and secured, while Knox, on the contrary, was in peril and exposed to loss, and that the effect of the order under the stipulation will finally adjust the rights of the parties between themselves.

It is claimed by counsel that the court had not the power to make the order. The rule as laid down in Chitty's General Practice, vol. 1, page 666, is that the superior courts favor the equitable mode of adjusting accounts between the same parties at common law, if there be cross-actions, or suits, and allow one judgment to be set off against the other, and sometimes *even stay executions* in an action till judgment has been obtained by the defendant by a cross-action so as to enable the latter afterwards to obtain an off-set (Masterman v. Malin, 7 Bing. 435). It is claimed that this authority cited by the elementary writer does not sustain the rule. It is true the case shows the rule obtained to support the motion for the set-off was discharged by the court; but not until the court had de-

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Opinion of the Court, by SPEER, J.

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terminated to make the rule absolute by granting it, and so communicated its decision to counsel, whereupon the counsel furnished an affidavit proving that the judgment in the suit sought to be stayed had actually been levied under a *ca. sa.* The reporter was consequently authorized to announce the rule as stated by Mr. Philips. On these principles relief has been granted in all the courts (*Terry v. Roberts*, 15 *How. Pr.* 65). It is the equitable control which they are authorized to exercise over the parties and proceedings in causes before such courts to promote equity and prevent injustice. The late chancellor of this State has said this power of a court of chancery to set off on motion, is the same as that of a court of common law, but that the jurisdiction of the court of chancery is more extensive than that of the common law court (*Duncan v. Vandenburg*, 1 *Paige*, 622). If no possible injury results to the parties by a stay of proceedings, it seems difficult to perceive why a stay of execution on a judgment for a brief period should not be granted, until a judgment has been obtained by the defendant, in a cross-action to enable him to make an off-set.

The subject matters of the two actions are such as justly call for a settlement, without further trial of issues of facts.

If, therefore, the order of the court below staying the proceedings on execution until the decision of the question of law involved will finally adjust the rights of the parties without gaining advantage or suffering harm from the fact that one judgment is prior in point of time to the other, the order should not be set aside.

The order appealed from must be affirmed with costs.

• FREEDMAN, J., concurred.

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Statement of the Case.

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LOUIS HEIDENHEIMER, PLAINTIFF AND APPELLANT, v. DAVID MAYER, DEFENDANT AND RESPONDENT.

I. USURY.

1. COMMISSIONS AND CHARGES FOR EXPENSES.

(a) DEVICE TO COVER USURY, WHEN.

1. Charges of *specific sums or certain percentages for prospective commissions and losses or expenses on and for the anticipated borrowing*, by the creditor, of the sum forborne during the period of forbearance, the debtor agreeing to pay such charges at all events, whether the commissions be earned or not, or whether the losses and expenses occur or not, *constitutes usury*.

(a) EXAMPLE. A creditor, upon giving time for payment of a present indebtedness to be paid in four installments, one at the end of twelve months, one at the end of eighteen months, one at the end of twenty-four months and one at the end of thirty months, took notes of the debtor, having those periods to run respectively, and in each note included the legal interest for the period the note had to run, *and two and a half per cent. commission for each six months, and one and a half per cent. for each three months the note had to run*, the percentages being calculated on the portion of the principal indebtedness for which the note was given; the two and a half per cent. was charged for commissions for the anticipated borrowing each three months during the running of the notes respectively of the amount of the principal indebtedness secured thereby for the use of the creditor, and the one and a half per cent. for anticipated losses, charges, and expenses in so borrowing. There was no evidence that the creditor had been obliged to borrow by reason of this extension of time, or had in fact borrowed, or had been put to any loss, charges or expenses in and about borrowing.

HELD

*a device or cover for usury.*

2. GOVERNING LAW.

- (a) The notes being dated and payable at the city of New York,

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Respondent's points.

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and having been delivered to the payee in the State of New York, by being mailed by the maker at the city of New York to the payee by his direction,

HELD

*the contract was not only made, but to be performed in the State of New York, and the usury law of that State governs.*

8. GUARANTY.

(a) EFFECT ON, OF USURY IN THAT WHICH IS GUARANTEED.

1. If the notes or other obligations, the payment whereof is guaranteed, are void for usury, then if the guaranty has no other or different consideration than such notes or obligations, *it necessarily falls with the notes or obligations.*

Before SPEIR and FREEDMAN, JJ.

*Decided June 25, 1877.*

The action is brought upon the defendant's guaranty of four notes of Joseph Bernhard, two of which had been paid. The defense is usury. The four notes are all dated March 11, 1873, at the city of New York, and are payable there. The guaranty was delivered simultaneously with the notes by Bernhard, to the plaintiff, by mailing the same to him in a letter at the city of New York, by his direction.

The action was tried before the court without a jury by consent of parties, and judgment was ordered for the defendant against the plaintiff, with costs.

*R. W. Townsend*, attorney, and *A. R. Dyett*, of counsel, for respondent, urged :—1. The four promissory notes, being not only *dated*, but *payable* at the city of New York, were New York contracts, and their validity is to be determined by the laws of this State. (*Lée v. Silleck*, 33 *N. Y.* 615; *Jewell v. Wright*, 30 *N. Y.* 259; *Hildreth v. Sheppard*, 65 *Barb.* 265; *Jack v. Nichols*, 5 *N. Y.* 178; *Cope v. Wheeler*, 41 *N. Y.* per *WOODRUFF, J.*, at foot of page 311; *Cook v. Litchfield*, 9 *N. Y.* 280; *Newman v. Kerson*, 10 *Wis.* 338;.

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Respondent's points.

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Consequa v. Fanning, 3 *Johns. Ch.* 587, 610 ; 17 *Johns.* 511, 520, 521 ; *Story on Confl. of Laws*, 7th Ed. §§ 279, 280). If there be any cases apparently in conflict with these cases they will be found on examination not to be so ; but if otherwise they must all yield to the superior authority of the above cases of *Lee v. Silleck* and *Jewell v. Wright*.

II. The four notes were not only *payable* at the city of New York, but those notes and the guaranty having been sent to the plaintiff by Bernhard, by mail, at and from the city of New York, by *the plaintiff's direction*, were *delivered* in this State (*Barry v. Eq. Ins. Co.*, 59 *N. Y.* 587 ; at pages 589 and 594). They were contracts, therefore, not only to *be performed* in this State, but were *executed and delivered* there.

III. But if the notes and guaranty were otherwise valid, the plaintiff knew the usury laws of this State, and that the notes and guaranty were for that reason void, and the plaintiff is not protected by that comity which otherwise would aid him to enforce them in this State (*Miller v. Tiffany*, 1 *Wall.* 298 ; *Merchants' Bank v. Spaulding*, 5 *Seld.* 53 ; in which the notes were both payable in New Jersey, at foot of page 62).

IV. The defendant had the right to set up usury in the four notes (*Paschall v. L'Amoureux*, 37 *Barb.* 189 ; *Price v. Lyons Bank*, 33 *N. Y.* 55 ; *Rosa v. Butterfield*, *Id.* 655). The guaranty had no independent consideration from, and was delivered simultaneously with the notes, and when they fell, the guaranty fell with them (*Same cases*).

V. The position that the "commissions" and "charges" which went to make up the notes were for services or expenses, within the cases allowing such items, is hardly tenable. Indeed, the finding of the judge that they were fictitious, and mere pretexts for usury, is conclusive ; and it was fully sustained by

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Appellant's points.

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the evidence. The intent which is essential, is not an intent to violate the statute, but an intent to take more than seven per cent., and is to be deduced from the facts (*Fiedler v. Darwin*, 50 *N. Y.* 437; *Hall v. Earnest*, 36 *Barb.* 325). If, however, it be thought necessary to refer to the cases where such items have been allowed, it will be seen that they differ *toto cælo* from the present. Some of these cases are *Elwell v. Chamberlain*, 31 *N. Y.* 611; *Smith v. Morris*, 27 *Id.* 138; *Trotter v. Curtis*, 19 *Johns.* 160; *Seymour v. Marvin*, 11 *Barb.* 80. See also the following cases: *Dry Dock B'k v. Am. Life Ins. Co.*, 3 *Comst.* 344; *Clark v. Sheehan*, 47 *N. Y.* 194, 197; *Harger v. McCullogh*, 2 *Denio*, 121; *Steel v. Whipple*, 21 *Wend.* 105; *Cleveland v. Loder*, 7 *Paige*, 557; *Brown v. Vredenberg*, 43 *N. Y.* 195; *Bank of Salina v. Alvord*, 31 *Id.* 473; *Tyler on Usury*, (1873), 329-338. In all the cases where such charges have been allowed, they were *for service actually rendered in good faith*. In *Williams v. Hand*, 7 *Paige*, 582, a charge for anticipated trouble and expense was condemned as usurious, and the case is exceedingly like the present.

*Sigismund Kaufman*, attorney, and *Lewis Sanders*, of counsel for appellant, among other things urged:—  
I. The original contract between Kapp, Bernhard & Einstein was made *in Germany*, for money to be *advanced in Germany*; the money *was advanced in Germany*, and in March, 1873, the debt was *held in Germany* by third parties, *there* to be repaid.

II. The release of Bernhard from his liability to pay *the other two-thirds* of the debt due Heidenheimer, is ample consideration for the guaranty in suit (*Woodcock v. Bennett*, 1 *Cow.* 733; *Waydell v. Lauer*, 3 *Denio*, 417; *Livingston v. Radcliff*, 6 *Barb.* 206).

III. The release of Kapp and Einstein from *their liability to pay the one-third* guaranteed by the defen-

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Appellant's points.

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dant Mayer, is a valuable consideration which will support the guaranty.

IV. The guaranty, being given at the same time as the notes, is valid and binding, if the consideration of the notes was legal (*Bickford v. Gibbs*, 62 *Mass.* 155-6; *McLaren v. Watson's Exrs.*, 26 *Wend.* 435; *Emmott v. Kearns*, 5 *Bing. N. C.* 559; *Leonard v. Vredenberg*, 8 *Johns.* 29). 2. The guaranty is binding, if it have an independent valuable consideration to support it, as it is an independent contract (*Baily v. Freeman*, 11 *Johns.* [m. p.] 221; *Veazie v. Willis*, 6 *Gray [Mass.]* 93; *Leonard v. Vredenberg*, *Bickford v. Gibbs*, cited *supra*). 3. The guaranty expresses a consideration and its receipt. Defendant estopped from denying the receipt after plaintiff accepted and acted upon it, without showing plaintiff knew the money had not been paid (*Continental N. Bank v. Ntl. Bank Com.*, 50 *N. Y.* 580; *Watson's Exrs. v. McLaren*, 19 *Wend.* 563, and cases cited; *Duchess Kingston's Case*, 2 *Smith L. C.* [End. ed.] 873).

V. The defense of usury fails, because the money was advanced in Germany—on a contract *made* in Germany, on a promise to *repay* in Germany—and in Germany there is no usury law or forfeiture of contract. The notes and guaranty were delivered in Germany on a contract accepted there, and the guaranty expressly states: "I herewith guarantee to Mr. Louis Heidenheimer, IN FRANKFORT-ON-MAIN, Germany, the *punctual payment* of the following notes." The usury laws of New York do not govern the contract in suit, and cannot avoid a contract valid by the laws of Germany, and not against the public policy of the *lex fori*. The notes were negotiated in Germany, though payable with current rate of exchange in New York, and come within the rule laid down in *Tilden v. Blair* (21 *Wall. U. S.* 247), where a draft was accepted and made payable in New York, but first



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Opinion of the Court, by SPEIR, J.

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negotiated in Chicago, Ill.—held: “It is plain, therefore, that the contract is an Illinois contract, and the rights and liabilities of the parties must be *determined according to the law of that State*” (Held in *Miller v. Tiffany*, 1 *Wall.* 310). “If the *rate of interest* be higher at the *place of the contract* than at the place of performance, the parties may lawfully contract in that case, also, *for the higher rate.*” This principle is considered and affirmed in *Chapman v. Robertson* (6 *Paige*, 634, citing *Depau v. Humphreys*, 20 *Mart.* 1. See *Bank of State of Georgia v. Lewin*, 45 *Barb.* 342).

VI. The letter of Heidenheimer, offered by defendant, claims that the expenses and the 7 per cent. cover all the additions to the principal, except a small commission for services—services rendered in keeping up or carrying the loans originally obtained for the firm of Kapp, Bernhard & Einstein. Mr. Heidenheimer claims to have done this; no one with any knowledge on the subject was called to contradict it; it was defendant’s evidence, and Heidenheimer is unimpeached. *Onus probandi* is on defendant to show that charges, and commissions and expenses for raising or carrying loans in Germany, are exorbitant or unusual, or a mere cover, to constitute usury (*Trotter v. Curtis*, 19 *Johns.* 160, where commissions of 2½ per cent. were charged on drafts for advances; *Elwell v. Chamberlain*, 31 *N. Y.*, 615; *Seymour v. Marvin*, 11 *Barb.* 87; *The Dry Dock Bank v. Am. Life Ins. Co.*, 3 *N. Y.* 355; *Smith v. Marvin*, 27 *Id.* 137; *Tyler on Usury*, 3d ed. 128).

BY THE COURT.—SPEIR, J.—It appears from the evidence in the case, that the firm of Kapp, Bernhard and Einstein, owed the plaintiff \$12,387.90, for money advanced by him in Frankfort-on-Main in Germany, by his drafts on them payable in the city of New York, but they did not pay the drafts. This sum of

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Opinion of the Court, by SPENCER, J.

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\$12,387.90, included interest and commissions for advances. The plaintiff's right to these commissions is not in dispute. Subsequently, when the four notes were given, the indebtedness of the firm was divided into three equal parts of \$4,129.30 each, and each member assumed one of said parts, as his share.

The plaintiff agreed with Bernhard to give time for payment by him of his said share, amounting to \$4,129.30, as follows; on \$1,129.30, part thereof, for 12 months from March 11, 1873, on \$1,000 thereof, for 18 months from March 18, 1873, \$1,000 thereof, for 24 months from March 11, 1873; and on \$1,000, balance thereof, for 30 months from March 11, 1873, upon his giving his four several promissory notes: one at 12 months from March 11, 1873, for \$1,321.77, gold; one at 18 months from March 18, 1873, for \$1,255.00, gold; one at 24 months from March 11, 1873, for \$1,340.00, gold; one at 30 months from March 11, 1873, for \$1,425.00, gold. Such notes to be guaranteed by defendant.

The notes and guaranty were given.

The amount of these notes was arrived at by the following statement:

Total amount of indebtedness of Kapp, Bernhard & Einstein, divided into three parts, 9831.40	}	fl. 2949.05
each one-third $\frac{1}{3}$ , - - - - -		
fl. at 42 cts. gold, - - - - -		\$4,129.30
		being
		amount due by each individual party, March 18th, 1873, in gold.

DIVIDED INTO FOUR PAYMENTS.

\$1,129.30, at 12 mos. from March 11th, 1873.

79.05 interest at 7 per cent.

56.46 commission each 6 months  $2\frac{1}{4}$  per cent. making 5 per cent.

56.46 charges  $1\frac{1}{4}$  per cent. each 3 mos., 5 per cent.

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\$1,321.27 in gold, first payment.

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 Opinion of the Court, by SPEIR, J.
 

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\$1,000.00. at 18 mos. from date of maturity, March 18th, 1873.

105.00 Int. at 7 per cent., for 18 months.

75.00  $2\frac{1}{4}$  per cent. commission in each 6 mos.  $7\frac{1}{2}$  %

75.00 charges  $1\frac{1}{4}$  per cent. each 3 mos.  $7\frac{1}{2}$  per cent.

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\$1,255.00 in gold.

\$1,000.00 at 24 mos. from March 11th, 1873.

140.00 Int. at 7 per cent. for 24 months.

100.00  $2\frac{1}{4}$  per cent. commission for each 6 mos. 10 %

100.00 charges  $1\frac{1}{4}$  each 3 mos., 10 per cent.

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\$1,340.00 in gold.

\$1,000.00 at 30 months from March 11th, 1873.

175.00 Int. at 7 per cent. for 30 months.

125.00  $2\frac{1}{4}$  per cent. commission each 6 mos.  $12\frac{1}{2}$  %

125.00  $1\frac{1}{4}$  per cent. charges each 3 mos.  $12\frac{1}{2}$  %

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\$1,425.00 in gold.

The  $2\frac{1}{4}$  per cent. mentioned in the statement was called and intended by the plaintiff as commissions, and the  $1\frac{1}{4}$  per cent. therein mentioned was called and intended by him as contingent expenses to be incurred for raising and borrowing money for the plaintiff's use during the said period.

An agreement is not necessarily usurious which provides a commission on advances made by a factor, or where money has been advanced by factors to pay drafts, and the commissions have been earned. Nor is it *per se* usurious for an agent or factor to agree for a reasonable commission to be paid by the principal for accepting and paying bills with funds furnished by the latter. The rule extracted from the English cases clearly defines the distinction which exists in these cases. It is, wherever the lender stipulates even for the chance of an advantage beyond the legal interest, the

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Opinion of the Court, by SPEER, J.

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contract is usurious, if he is entitled by the contract to have the money lent, with the interest thereon, repaid to him at all events (*Barnard v. Young*, 17 *Vesey*, 44; *Chippendale v. Thurston*, 1 *Car. & Payne*, 101). In cases of this kind it becomes a question of intent which is essential to constitute the offense of usury. But the intent must be deduced from and determined by the facts. Knowingly and intentionally taking or reserving a greater interest or compensation for a loan than that allowed by law is *per se* usurious. The intent is manifest in this case. The transaction was a mere pretense or cover to take more than seven per cent. for the use of the money during the term of the loan, and so the court below has found. The plaintiff writes :

“I have to say, Gents, that the proposition which you make, and according to which it would take three years until I would be paid off by you, is not quite reasonable. You know not and cannot judge about the trouble it gives me, to raise and provide the large amount advanced to you. If I would have been prepared for it, or if I had made arrangements before with you accordingly, it would be different ; but instead of that, and as I have no cash to my disposition, but have to borrow the money from three to three months, or raise the amount by drafts on my friends and relations living out of the city, it is great trouble to me ; three months is the longest time allowed in this country for such transactions, and then it can only be done with more or less expenses, such as loss on exchange, brokerage, commission, stamps, etc. Regarding the interests offered by you, I will not accept the same, and I have charged you only, as you will see by my account, the regular interest of seven per cent. But as the transaction as it now stands gives me considerable more work and trouble as if I would transact for you in a regular business way, I have to charge you the same commission as if this would be the case, and which is

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Opinion of the Court, by SPEIR, J.

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two and a half per cent. for each six month, or for twelve months twice two and a half per cent., or five per cent., and so on. (The time for closing up your transactions before took always about six months, and I charge you two and a half per cent. for it.)

“Besides this, however, I have to charge you for each three months one-quarter per cent. to raise and cover the amounts by borrowing and as described above, and which scarcely covers my loss and disbursements, and for which you have also to come up. You can surely also not object against this, or I would be compelled to sell some of my American securities, and where I would lose none, and under the present horrid state of money matters and difficulties on all European exchanges, perhaps ten to twenty per cent., and which I would then have to charge to you. Since I wrote you last on this subject, it has changed yet considerably to the worse in this direction. By my actions you see that I do all in my power, and with so much trouble to assist you, and at the same time to save you from losses so much as possible, but above that I cannot go. Consequently the charges are seven per cent. for interests; five per cent. for commissions, and five per cent. for losses and disbursements, which makes altogether seventeen per cent.”

There was no evidence that the plaintiff had been obliged to borrow by reason of the extension of time, or had in fact borrowed, or had been put to any loss, charge or expense over and above borrowing.

The *debtor* agrees that commissions might possibly be earned, and were proper, although they had never been earned, and by the terms of his obligation agrees to pay them at all events, whether earned or not, and the stipulated percentage for prospective losses and disbursements which may be met in the future, whether they actually occur or not. It is evident that the plaintiff intended to stipulate for this chance of a

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Opinion of the Court, by SPEIR, J.

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greater profit than seven per cent. for the use of his money, as it is made a part of the written agreement showing the terms upon which the use of the money was made, and it does not appear there was any mistake or misunderstanding in making the agreement. If agreements of this character are carried out and tolerated by the courts the most oppressive exactions of usury would become legalized, because the necessitous and indigent debtor had agreed to the extortion.

The appellant's counsel contends that the original contract was made in Germany for money to be advanced in Germany. It cannot be denied that a contract is to be governed by the laws of the place where it is made, if it is not to be performed according to the terms of the contract elsewhere (*Story on Conflict of Laws*, § 282). The four notes are dated and payable at the City of New York, and they were delivered in this State, as they were mailed in this city by Bernhard to the plaintiff, and by his directions. I am unable to appreciate the view taken by counsel between the notes and the guaranty as separate existing contracts. If these notes are intrinsically usurious, and therefore in violation of the statute, the guaranty is equally so. It had no different or other consideration than the notes. They were delivered at the same time and identical in their consideration, and the contracts are not independent (*Rosa v. Butterfield*, 33 N. Y. 665).

An examination of the requests by plaintiff for additional findings of fact shows that they were properly refused; and the exceptions to the facts found, and conclusions of law, were properly overruled.

The judgment appealed from must be affirmed, with costs.

FREEDMAN, J., concurred.

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Statement of the Case.

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JOSEPH ENEAS, PLAINTIFF AND RESPONDENT, v.  
HERMAN F. HOOPS, DEFENDANT AND APPELLANT.

I. GUARANTY.

1. GUARANTOR, CHARGING.

- (a) Demand of payment from principal, and notice to guarantor *not necessary when the guaranty is absolute: e. g., when the guaranty is as follows:*

“For and in consideration of the sum of one dollar, I hereby guarantee the payment of invoice of cargo covered by within contract.”

2. GUARANTOR, DISCHARGING.

(a) ALTERATION OF CONTRACT GUARANTEED.

1. An alteration or variation, materially affecting the contract guaranteed, *will discharge the guarantor.*

(a) ADVANTAGE TO GUARANTOR. This although the variation may be to his advantage.

2. *Example of alteration discharging guarantor.*—The guaranty was of the payment of the purchase-price of a cargo of nuts agreed to be sold and delivered. A subsequent agreement, made without the consent of the guarantor, that the vendee need not take the deck-load (if under the term cargo, used in the guaranteed contract, the vendee was bound to take the deck-load), will discharge the guarantor.

II. CUSTOM.

1. Words and phrases in a contract, *custom admissible* to show the sense in which they were used, when.

(a) TRADE WORDS. The sense which words have acquired in the trade with regard to which they are used, may be shown by usage.

1. *Ambiguity, art, science, &c.* It is not necessary that the word or phrase should be at all ambiguous on its face, or relate to an art or science.

III. CARGO.—DECK-LOAD.—FRUIT.

1. The term cargo *may be shown* by the usage of the fruit trade to exclude the deck-load, when it is used in reference to that trade.

IV. EVIDENCE.

1. ESTIMATION, WHEN INADMISSIBLE.

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Statement of the Case.

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(a) An estimate made on a part of a whole does not necessarily furnish a basis for a calculation as to whole, based on such estimate.

1. *Therefore, an offer to prove by a witness (an expert), that he had estimated the number of culls in a part of a cargo, and that he could estimate such percentage with accuracy, with the view of showing the percentage of culls in the whole cargo, was properly excluded.*

Before SEDGWICK and SPEIR, JJ.

*Decided June 25, 1877.*

Appeal from a judgment for \$7,500 rendered on a verdict for the plaintiff, and also from an order denying a new trial.

The plaintiff and Joseph Heron, on May 11, 1875, in New York made this agreement: "I have this day bought of Joseph Eneas, the cargo of cocoanuts on board the schooner 'Wm. R. Knighton,' now here, for forty dollars per thousand, as they run, throwing out cracks and rots only. The cargo to be of prime, merchantable quality, culls not to exceed ten per cent. Ten working days to discharge. I am to furnish one man to count and select with his man, and to sign receipts for them as they are delivered. He to pay the man for his time. Cargo bought on four months time, to be paid for by my note, for one-half of whole amount, at four months, indorsed by Hoops; the balance to be paid for on or before the expiration of four months. Interest at the rate of seven per cent. per annum to be allowed for the unexpired term.

(Signed)

JOSEPH HERON.

JOSEPH ENEAS."

The following guaranty was executed and indorsed by the defendant on the foregoing agreement: "For, and in consideration of the sum of one dollar, I hereby guar-



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Opinion of the Court, by SPEIR, J.

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antee the payment of invoice of cargo covered by within contract.

(Signed) H. F. HOOPS."

*Townsend & Mahan*, attorneys for defendant; *H. B. Townsend*, of counsel.

*Wm. W. Goodrich*, attorney and counsel, for plaintiff.

BY THE COURT.—SPEIR, J.—The action is brought upon the guarantee executed by the defendant after the expiration of the term of credit provided for by the agreement. It is in evidence that after the above credit had expired the plaintiff commenced an action, and recovered a judgment against Heron for the same amount as was recovered in this action, and notice of pendency of that action was given to the defendant herein, who was a witness at the trial. The guaranty in the case is absolute, and did not require any preliminary demand of payment upon the principal debtor, and notice of non-payment. Nor does it appear that the omission of such demand and notice has been the occasion of any injury to the defendant. The defendant made no stipulation for notice to him as guarantor in any event. The points made in these respects by defendant's counsel may therefore be disregarded.

The terms of the contract of guaranty must be strictly complied with, or the guarantor will not be bound, and any subsequent alteration at all materially affecting the principal contract made without his consent discharges him.

The cases go to the extent of holding that although such variation may be to the advantage of the surety, yet it releases such surety from all liability on his contract. It is not a question whether he is harmed by a deviation to which he has not assented (*Barnes v. Barrow*, 61 N. Y. 39). He has the right to prescribe

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Opinion of the Court, by SPEIR, J.

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the exact terms upon which he will enter into the obligation, and in case of variance to avail himself of the technical objection that it is not his contract.

The defendant claims that there was a revocation of the agreement between the plaintiff and Heron. That by it the *deck-load*, consisting of about ten or twelve thousand cocoanuts, was excluded from the operation of the contract. That under the contract as originally made, the plaintiff was bound to deliver, and Heron was bound to receive, the whole of the cargo, including the deck-load, and that subsequently it was agreed without the defendant's assent that Heron need not take the deck-load. The learned judge admitted the legal proposition, and charged the jury that, if this was so, such subsequent agreement amounted to an alteration of the contract guaranteed, and the guarantor was discharged.

The plaintiff introduced certain evidence tending to show a custom in the city of New York, and on the exchange, by which in the fruit trade *deck-load* was not included as part cargo. It is clear, if such custom can be maintained there would be no variation in the contract between the plaintiff and Heron. By excluding the deck-load from the contract, the legal consequences flowing from the foregoing proposition would be avoided.

The introduction of the evidence of custom was opposed upon the ground that the term *cargo* is neither a technical or professional term, or a word having any significance in any art, business, trade or calling different from its ordinary accepted use. In short, that the word has a definite well-known meaning.

The custom should be reasonable, as growing out of the exigencies and conveniences of commerce and trade. The point is, are the words or phrases of a written contract to be understood in that sense which they have acquired in the trade with regard to which they are

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used. In *Myers v. Earle* (3 Q. B. 20, November, 1860, 30 L. J. 9), the court say, "I do not think that in order to introduce this extrinsic evidence, it is necessary that the phrase itself should be at all on the face of it ambiguous." In *Houghton v. Gillut* (7 Car. & P. 701), the word "cargo" received a mercantile construction, as applicable to that case. Nuts, like most articles in the fruit trade, are exposed to the vicissitudes of weather, and cannot be so well preserved as when conveyed under the deck. In this case Herron refused to accept the deck-load. The court instructed the jury that, inasmuch as there was a conflict of evidence on the question whether such a custom prevailed, it was for them to determine the fact.

The defendant offered to show by an expert witness, that he estimated the number of culls in a part of the lot which was to be sent to auction, and that he could estimate such percentage with accuracy. This was properly excluded. It did not follow that the percentage on the whole cargo could be ascertained by a calculation of the percentage on a portion of it. It was shown that in that part of the cargo received by Herron there were 17,050 culls, and there were only 6,364 left in the whole remaining part which were sold at auction. In other words, 238,363 nuts were sold and delivered, and the culls, as stated in the receipts, were 23,414, which is less than ten per cent.

It is claimed by the defendant that the cocoanuts, excluding rots and cracks, were not prime and merchantable. The contract of warranty was "\$40 a thousand as they run, throwing out cracks and rots only, the cargo to be of prime, merchantable quality, culls not to exceed ten per cent." It is to be observed that this is a warranty with a qualification. The important fact to be determined relates to the percentage of the culls on the whole cargo. It has already been shown that they did not contain more than ten per cent.

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Statement of the Case.

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Eneas and Herron, by agreement, each appointed a counter to select and throw out all cracks and rots, in order that the nuts which they both selected as sound should be delivered to Herron. They were duly receipted for until he refused to receive any more. This was an acceptance of the goods by Herron, so far as cracks and rots were concerned. Under all the facts and circumstances, and in view of all the evidence, the question was left for the jury to determine whether there was a breach of the warranty as to the prime and merchantable quality contemplated by the principal contract.

The requests to charge are embraced in the motion to dismiss, except two, which were charged by the court.

The judgment and order must be affirmed with costs.

SEDGWICK, J., concurred.

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**THE FARMERS' AND MECHANICS' NATIONAL  
BANK OF BUFFALO, PLAINTIFF AND RES-  
PONDENT, v. ERASTUS S. BROWN, BENJA-  
MIN J. LOGAN, AND JOSEPH P. PRESTON,  
DEFENDANTS AND APPELLANTS.**

**I. PERSONAL PROPERTY--TITLE TO.**

**1. PURCHASE BY A AT THE REQUEST OF B.**

*(a.) Title and property vests in A, when.*

B, doing business at New York, sent an order to A, doing business at Buffalo, to buy wheat for him and ship it, advancing the purchase price himself. A not having the money with which to pay the purchase price, applied to the cashier of C, (a bank at Buffalo) stating he had the order to buy, and asking if the bank would discount a draft at 20 days, drawn on B at New York for an amount sufficient to pay for the wheat with

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Statement of the Case.

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the bill of lading consigning the wheat to the Bank as security; the Bank consented to do so. A thereupon purchased the wheat ordered by B, and shipped it, consigning it not to B, but to the cashier of the Bank, and drew a draft on B for the purchase money, but only agreed to deliver the wheat to the drawer upon condition that the draft should be accepted and paid. *The Bank discounted the draft, receiving from A the bill of lading for the wheat as security, and gave A a check for the proceeds of the discount, with which A paid the purchase price of the wheat. A made the purchase as principal vendee without disclosing to his vendor for whom he was acting.* After the order to purchase, but before the purchase, B wrote to A, asking him not to draw for any margin, but to advance the whole purchase price himself, assigning as a reason that prior thereto he had purchased on his (B's) order, and had drawn on him at sight for part of the purchase money, known as "margin," and a time draft for the balance, which he (A) had procured to be discounted by the Bank of Commerce, in Buffalo, with a bill of lading as collateral; and the Bank was refusing to deliver the bill of lading until the time draft was paid; and he (B) was trying to get the bill of lading in that case, and suggesting to A to consign to his (B's) "care" instead of "notifying me."

## HELD THAT

- (1.) A, upon the purchase, became the owner of the goods, with full power and authority to dispose of it as he saw fit.
- (2.) A, by his transaction with the Bank, transferred his title and ownership to the Bank.

## II. BILL OF LADING.

1. SPECIAL INDORSEMENT—EFFECT OF, AS TO THE PASSING OF TITLE BY DELIVERY OF THE BILL OF LADING, OR BY ITS INDORSEMENT AND DELIVERY.

(a.) Upon a bill of lading whereby wheat was shipped by A, consigned to C, at the City of New York, to be delivered to C or its order, on payment of freight and charges, C indorsed a letter directed to B, stating that the bill of lading, with insurance on the same, were pledged to it (C), as security for the payment of an accompanying draft drawn on him (B); and that the property was placed in his (B's) custody in trust for that purpose, and that it was not to be devoted to any other use until the draft was paid; and that upon his (B's) accepting and paying the draft, its (C's) claim would cease. C sent the draft, with the bill of lading attached to its correspondent at New York, who presented the same to B, who accepted them, and.

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Opinion of the Court, by SPEIR, J.

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detached and retained the bill of lading and certificate of insurance annexed. B did not pay the draft.

HELD,

The property in the wheat did not pass to B.

(b.) On or shortly after the arrival at New York of the boat on which the wheat was shipped, but before its delivery to any consignee, B procured a sample thereof and sold the cargo by such sample at the Produce Exchange, to D, who knew that the cargo was afloat and had not been delivered to any consignee. B, by producing to the carrier's agent the aforesaid bill of lading, prevented a delivery of the wheat to D.

HELD

The draft having been dishonored that D acquired no title to or property in the wheat as against C.

III. USAGE, INADMISSIBLE.

1. PROOF OF USAGE, WHICH WOULD AID B OR D TO MAKE TITLE TO THE WHEAT, IS INADMISSIBLE.

Because it cannot be invoked to change the established rules of law, or to change or modify the express terms of the contract.

Before SEDGWICK and SPEIR, JJ.

*Decided June 25, 1877.*

Appeal from judgment entered on verdict in favor plaintiff.

The action is in trover for the conversion of wheat.

*Evarts, Southmayd & Choate*, attorneys, and *Joseph H. Choate*, of counsel, for appellants Logan and Preston.

*W. Howard Wait*, attorney, and of counsel, for appellant Brown; *Fithian & Clark*, attorneys, and *Freeman J. Fithian*, of counsel, for respondent.

The points of counsel in this case, and in that of the same plaintiff against Brown & Atkinson, are too elaborate to admit of a condensation which will do them justice, and too lengthy to insert in full.

BY THE COURT.—SPEIR, J.—The verdict of the jury has established that the wheat came to the possession

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Opinion of the Court, by SPEIR, J.

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of the defendants, and that there was a conversion. The inquiry now is, to whom did the wheat belong when it came into the hands of the defendants, and when they refused to surrender it, upon demand of the plaintiff?

Sears & Daw, the shippers residing and doing business in Buffalo, received an order from the defendant, E. S. Brown, a commission merchant engaged in business in the city of New York, and dealer in grain, to buy wheat for him, and ship it and advance the purchase price themselves. The shippers, not being furnished with the funds for the purpose, borrowed the money of the plaintiff. It is not open to question that they, having purchased it at Buffalo, and paid for it with their own money, became its owners with full power and authority to dispose of it, as they saw fit, although the purchase was at the request of Brown, their correspondent, and on his ultimate account. Had they after the purchase sold the wheat to any one living in Buffalo, or any where else, other than Brown, the vendee would have had title as owner. They made this purchase as principal vendees without disclosing to their vendor for whom they were acting. It will not be contended that Brown, at whose request the wheat was bought, at this stage of the transaction could have interfered with the power of disposition; and it is not pretended but that the shippers could have transferred their ownership to him in New York. They undoubtedly expected their correspondent Brown would become a purchaser from them, and it is to be presumed that they bought from their vendor with that reasonable expectation.

Before the purchase was made it appears that Sears and Daw called upon the plaintiff and stated to its cashier that they had the order to buy the two loads of wheat at the price named, and asked if the bank would discount drafts at twenty days, drawn by them

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Opinion of the Court, by SPEIR, J.

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on the defendant, Brown, at New York, for an amount sufficient to pay for the grain, with the bill of lading, consigning it to the bank, as security. Upon obtaining the consent of the bank so to do, they made the purchase of a dealer in the city of Buffalo, of the two cargoes of grain in question, which was then in store in an elevator in the City of Buffalo.

They then drew the drafts on their correspondent for the price, but they only agreed to deliver the wheat to the drawee upon the condition that the drafts should be accepted and paid. They shipped the wheat, but did not consign it to Brown, their correspondent, but consigned it to the cashier of the bank, and handed over to the bank the bills of lading as security for the drafts drawn against it. The bank discounted the drafts at the request of the drawers, and gave them a check for the proceeds, with which they paid for the grain so purchased. On the same day they caused the wheat to be laden on two canal boats, and the bills of lading made out and signed as to each boat, whereby the grain specified in each bill of lading was consigned to the plaintiff at the city of New York, to be delivered to the plaintiff, or its order, on payment of freight and charges, and the correspondent Brown was directed to be notified by the carrier of its arrival. On the day of the date of the drafts the shippers advised Brown of the whole transaction, and sent him an account of the purchase. At the same time the cashier of the bank sent the drafts to the plaintiff's correspondent in New York, the Bank of Commerce, with the bills of lading attached, and on them indorsed a letter addressed to Brown, stating in the most positive terms, that the bills of lading with insurance on the same were pledged to the plaintiff, as security for the payment of the draft, and that the property was placed in his (Brown's) custody in trust for that purpose, and that it was not to be diverted to any other use until



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the draft was paid ; and that upon his accepting and paying the draft the claim of the bank would cease.

The drafts with the documents annexed were presented to Brown, and he thereupon accepted them, and detached and retained the bills of lading, and the certificates of insurance annexed. Brown made no objections to these instructions.

Shortly after the arrival at New York of the boats on which the wheat was shipped, Brown procured a sample of the wheat, and sold the wheat by such sample at the Produce Exchange. At this time the wheat was afloat on the boat and had not been delivered to any consignee.

The cargo, which came by the boat "Frank J. Dorr," was thus sold to defendants Logan and Preston. After this sale Brown, by producing to the agent of the carrier the bill of lading for the cargo on the "Dorr" with the aforesaid indorsement thereon, caused its delivery to the purchasers Logan and Preston.

The position taken on behalf of the defendants is that the wheat having been purchased at the request of Brown by Sears and Daw as his agents, in Buffalo, he was the general owner of the property from the time of their purchase ; that Sears and Daw had only a special title, as factors, for their advance of the purchase money ; and that the bank by the transfer of the bill of lading to it acquired only such special title as pledgee, and upon its voluntary surrender to Brown he was vested with title as general owner, and discharged from any claim of the bank. In my opinion this position cannot be sustained, and has no foundation in law or fact.

Before the wheat was purchased and after Brown's requests to buy, he wrote to the shippers in substance asking them not to draw for any "margin" at sight,

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Opinion of the Court, by SPEER, J.

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but to advance the whole purchase price themselves, assigning as a reason that prior thereto they had purchased one or more cargoes of grain on Brown's order and had drawn on him at sight for part of the purchase price known as "margin" and a time draft for the balance, which they, S. & D., had procured to be discounted by the Bank of Commerce in Buffalo, with a bill of lading of the grain as collateral, and that the bank was refusing to deliver the bill of lading to Brown until the time draft was paid, and he, Brown, was trying to get possession of the bill of lading in that case, and suggesting to S. & D. to consign grain to his "care" instead of "notifying me."

Now, as it is clear that as to whether the property in the wheat passed to Brown, depends upon the answer which must be made to the question whether it was the intention of the shippers or the plaintiff, their successors in ownership, that it should pass before payment of the drafts, there can be no doubt what the answer must be. Up to the time Brown was informed of the purchase, and the whole transaction of the drawing of the drafts, and the bills of lading annexed, and the presentation to him for acceptance, and the delivery of the bills, he had no relation whatever as *owner* of these cargoes of wheat. Whatever responsibility he assumed, arose only out of his act of acceptance as drawee of the drafts, and the voluntary assumption on his part to execute the trust. No intent to vest immediate ownership in the drawee of the drafts can be implied in the face of these express arrangements, and positive orders to the contrary. It was a clear case of bailment, utterly inconsistent with the idea of ownership in the bailee. "For the rule of law is general, that whatever a man's *real* intention may be, if he *manifests* an intention to another party, so as to induce the other party to act upon it, he will be estopped from denying that the intention as *manifested* is his

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*real intention*'' (*Benjamin on Sales*, 306 [London Ed. 1868]; *Freeman v. Cooke*, 2 *Excheq.* 654). Moreover, these bills of lading upon their face are *prima facie* evidence of an intention to reserve to the shipper the *jus disponendi* and prevent the property from passing to the drawee of the draft (*Jenkins v. Brown*, 14 *Q. B.* 496; *Dows v. National Exchange Bank*, 91 *U. S.* 618; *Turner v. Trustees of Liverpool Docks*, 6 *Excheq.* 543). An early case is reported in 3 *Camp.* 92, *Barrow v. Coles*, which bears great resemblance to the case before us. It was trover for one hundred bags of coffee. N. and F. at Demarara, drew a bill of exchange upon one Voss in London, payable to their own order, and indorsed it to the plaintiff, at the same time annexing to it a bill of lading of the coffees in question, with an indorsement upon it making them deliverable to Voss if he should pay the draft, if not, to the holder of the said draft. The bill of exchange and the bill of lading being sent to Voss he accepted the former and detached the latter from it. He then indorsed the bill of lading for a valuable consideration to the defendant, but he did not pay the bill of exchange. Lord ELLENBOROUGH held that the special indorsement on the bill of lading ought to have made the defendants inquire whether the condition on which the coffees were deliverable to Voss had been fulfilled, and that after the dishonor of the bill of exchange the property in the coffees vested in the plaintiff.

There was abundant evidence in this case apprising the defendants of their duty to inquire for Brown's authority and power to give title to the wheat. Their broker knew that it was "Milwaukee No. 2," that it was then afloat on a canal boat, and had not then been delivered to any consignee (*Dows v. Perrin*, 15 *N. Y.* 325; *Bank of Toledo v. Shaw*, 61 *Id.* 283).

The plaintiff then being the owner of the wheat when Sears and Daw undertook to ship it to the de-

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Opinion of the Court, by SPEIR, J.

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fendant Brown, and when he received it, and converted it to his own use by a sale to the co-defendants, the right of the plaintiff to recover cannot be controverted. Brown could not divest it of the ownership. He held the wheat in trust for an express purpose, and the other defendants had, from all the circumstances of the case, abundant notice to put them upon inquiry.

It is not disputed that where there are circumstances in effect pointing in different directions, some indicating an intent to pass the ownership at once, notwithstanding the bill of lading, it becomes a question for the jury whether the property has passed. In this case I cannot find any facts disclosed to rebut the intent to retain ownership on the part of the bank. The bills of lading with their indorsements, and the written instructions, to hold the wheat till payment of the drafts, are not even subject to any interpretation or construction other than they bear on their face. There was no evidence received or offered tending to show any other intent. The circumstances relied upon by the defendants as tending to show that the property of the wheat vested in Brown, are not entitled to the significance attributed to them.

The defendants very properly were not allowed to prove or avail themselves of any alleged usage or custom of business among grain dealers in New York, or in the Produce Exchange, which would aid them to make title to the wheat. The evidence would be immaterial and incompetent, because such usage or custom could not be invoked either to change the established rules of law, or to change or modify the express terms of a contract. Here there was an express contract between the parties, which was neither ambiguous nor uncertain, and such evidence could not be resorted to. In our opinion there is no good ground for complaint against the rulings of the learned judge on the

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trial, and the exceptions must be overruled. The judgment must be affirmed with costs.

SEDGWICK, J., concurred.

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EMIL PONVERT, PLAINTIFF AND RESPONDENT,  
ALSO APPELLANT, v. AUGUST BELMONT, DE-  
FENDANT AND APPELLANT, ALSO RESPONDENT.

I. JOINT DEFENSE AT JOINT EXPENSE under an agreement therefor for the purpose of establishing title to the subject of the litigation for the benefit of parties mentioned in the agreement.

1. *Expenses, what items included in.*

(a) RENTS AND PROFITS OF THE SUBJECT OF LITIGATION, PROCURING THEM.

1. Although the expense in procuring them is *not an expense incurred in establishing the title, yet it is so connected* with its establishment by increasing the benefit to be derived therefrom, in which increase the parties are interested under the agreement, that it falls within the items of expenses to be jointly borne.

1. Belmont held two judgments against one Tylee, which were claimed to be liens on certain premises claimed to belong to Tylee in fee; Ponvert (of the firm of Chastelain & Ponvert), and one Shelton, held by assignment a mortgage on said premises, made by Tylee to Lovett, upon which a decree of foreclosure had been made; and also a certificate of a sale of the premises by the sheriff, under an execution issued on another judgment against Tylee. One Dempsey claimed the premises, and, before the recovery of the above judgments and assignment of the mortgage, had commenced a suit against Tylee and Lovett for the recovery thereof. Pending this suit, and after the recovery of the above judgments and making of the mortgage, but before the sale under execution and the assignment of the mort-

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gage, Tylee made an assignment to Chastelain (one of the firm of Chastelain & Ponvert), and one Turner, for the benefit of his creditors. The assignees had no funds with which to contest the Dempsey suit, and the creditors at large refused to contribute. Thereupon, shortly after the assignment, Ponvert and Shelton assumed the defense of the Dempsey suit, and defended it in Tylee's name until he became inimical, and suffered the bill to be taken as confessed against him, when under an order of the court, made July 24, 1848, Chastelain and Turner, the assignees of Tylee, made themselves parties to the suit, and thereafter the defense was conducted in their names. On December 12, 1849, Belmont and Ponvert and Shelton entered into an agreement, whereby it was agreed, among other things, that said judgments and decree should be paid, in a certain order named, out of the future proceeds of the property involved in the Dempsey litigation, and the balance of said proceeds, if any, should be paid to Chastelain & Ponvert and Shelton. The agreement then contained a mutual covenant between the parties that the Dempsey suit "should be litigated at the joint and equal expense of Shelton and Ponvert and Belmont, and that each should bear and pay one-half of all costs and counsel fees that had been incurred and paid by Shelton and Ponvert and Chastelain & Ponvert since the defense thereof was assumed by said Chastelain & Ponvert, and also all counsel fees and expenses thereafter to accrue until the final termination of the litigation."

Pending the Dempsey litigation, and also after its final termination, various suits were brought, on judgments recovered against Tylee subsequent to those mentioned in above agreements, and subsequent to the assignment by Tylee, to set aside that assignment as fraudulent and void, and to subject to the payment of those judgments the rents collected by the receiver appointed in the Dempsey suit. These suits were brought against Tylee's assignees, the said receiver and Tylee. Tylee's assignees defended them. There was also a

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proceeding in the Dempsey suit after its termination based on the petition of Ponvert to obtain from said receiver the proportion of the rents, collected by him, which said Ponvert claimed through the Tylee title.

HELD,

that Belmont was bound under the agreement to contribute to the expenses of the litigation and proceedings had in and about the procuring of the rents.

2. *Expense of litigation.*

(a) UPON WHOM CHARGEABLE IN ABOVE PUT CASE.

1. Ponvert having paid the whole of the expenses, he is entitled to reimbursement for one-half thereof from Belmont.

1. Although ordinarily the expense incurred by an assignee for creditors in protecting and collecting the assigned assets, are first payable out of the proceeds before distribution, yet, where the protection and collection is carried on and undertaken for the benefit of certain creditors, under an agreement whereby they were to share in the fruits in a certain specified manner and bear the expenses, such parties are bound by their agreement, and *cannot*, although the litigation and proceedings were carried on in the assignee's name, *claim that the expenses should be paid out of the proceeds before making the distribution called for by the agreement.*

Before CURTIS, Ch. J., and SPEIR, J.

*Decided March 5, 1877.*

This action is a part of the litigation growing out of the agreement, in substance set forth in Belmont v. Ponvert (35 N. Y. Super. Ct. 208). It is based on the mutual covenant contained in that agreement, that the *Dempsey suit* "should be litigated at the joint and equal expense of Shelton & Ponvert and Belmont, and that each should pay and bear one-half of all costs and counsel fees that had been incurred, and paid by Shelton and Ponvert and Chastelain and Ponvert since the defense thereof was assumed by said

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Chastelain and Ponvert, and also all counsel fees and expenses thereafter to accrue until the final termination of the litigation.”

The action was commenced in 1860, and it is alleged in the complaint, that under the above covenant the defendant became liable to pay to the plaintiff a certain sum of money in respect of certain legal expenses incurred in the litigation therein mentioned.

The answer admits the execution of the agreement alleged in the complaint, and the payment of \$1,000 by the defendant, and denies each and every other allegation of the complaint. A further and distinct defense is set up, that the amount alleged in the complaint to have been laid out and expended by the several parties therein stated, and at the times stated, for costs, counsel fees, and expenses, was without the knowledge of, or notice to the defendant, and without his consent, and grossly in excess of and beyond a reasonable and proper compensation for the services rendered.

On the trial it appeared that Daniel E. Tylee in 1843 claimed to be the owner of the undivided half of certain premises on Vesey, Greenwich, and Washington streets in this city. In the month of July of that year Jane Dempsey commenced an action against him, claiming title as against him to said undivided half of the premises, as heir at law of her sister Mrs Tylee.

On June 30, 1843, Tylee executed a mortgage on the premises to George Lovett, to secure the payment of \$12,000, upon which mortgage a decree of foreclosure and sale was entered in June, 1846, but was not executed, which mortgage and decree constituted the first lien on Tylee's interest in the premises. Shelton and Chastelain & Ponvert were creditors at large of Tylee. Ponvert and Shelton had purchased the Lovett mortgage, the first lien on the premises, and the decree thereon amounting to the sum of \$12,000 and interest. Belmont's judgment of \$5,550.08, was the second lien.



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Brown and Neilson's judgment for about \$18,500, was the third lien, which was also purchased by Ponvert and Shelton, and another judgment of Belmont for \$7,871.84, constituted the fourth lien on the premises.

Other facts are stated in the head note.

The case comes up on the report of the referee, who found in favor of the plaintiff on August 11, 1875, for \$12,022.37, on which judgment was entered.

Both parties appeal.

*Messrs. Bowdoin, Larocque & Barlow*, attorneys for defendant; *W. W. McFarland*, of counsel.

*Messrs. J. S. Lawrence* and *C. W. Sandford*, of counsel for plaintiff.

BY THE COURT.—SPEIR, J.—There was no property out of which this large indebtedness could be obtained, except the premises which were claimed by Mrs. Dempsey in the suit brought against Tylee. It was important, therefore, to sustain the title as the only source from which payment could be had. Ponvert and Shelton, and Chastelain & Ponvert were, at the time the agreement was executed, actually engaged in defending the Dempsey suit for the purpose of establishing Tylee's title. The several parties holding these claims made common cause for the sake of preserving their several liens in their respective orders and securing their payment. What inducements led the parties to enter into the agreement, other than as collected from its expressed terms, must, I think, be speculative. Whatever advantage, therefore, the parties may be supposed to have gained by entering into this arrangement other than *is set down*, need not be considered.

On the part of the defendant, the covenant is to the effect that his forbearance to redeem under his judg-

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ments, should in no way prejudice the lien of either of his judgments, or his right to their payment out of the future proceeds of the property, and that the future proceeds thereof, if sufficient for the purpose, should be applied in the order of priority of all the liens, and the balance, if any, to Chastelain & Ponvert and Shelton.

The first mutual covenant is in effect that the said suit of said Jane Dempsey should be litigated for the purpose of establishing the title of the said Daniel E. Tylee in the said premises, at the joint and equal expense of the said Shelton and Ponvert and the defendant; and that each should bear and pay one-half of all costs and counsel fees that had been incurred and paid by the said Shelton and Ponvert, and Chastelain & Ponvert in defense of the suit of Jane Dempsey, after the defense was assumed by Chastelain & Ponvert, and all costs and counsel fees and expenses thereafter to accrue, until the final determination of the litigation.

The second mutual covenant is that neither of said judgments, nor the said mortgage decree, nor the sheriff's certificate should be used by either of the parties to the prejudice of the other, but for the purpose of perfecting the title to the premises, carrying out the agreement, and cutting off liens and incumbrances thereon.

Without the litigation of the Dempsey suit, and a decision sustaining Tylee's title, there would be no property upon which these liens would attach. This covenant was therefore of equal importance to all the parties. All the covenants in the agreement are harmonious, expressing the whole intention of the parties, and, I think, are singularly clear and unambiguous, disclosing a common intent and purpose. It is to be observed that the legal status of all the parties interested at the time they entered into the arrangement

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is carefully preserved in their covenants, the terms and conditions of which are entirely prospective, binding the parties thereto, and all of them, to refrain from performing all acts which should lead to the prejudice of each other in attaining the common end of perfecting the title to the premises, in carrying out the agreement.

The defense of the Dempsey suit was necessarily made in the names of Tylee's assignees holding the legal title. But the assignees had no funds with which to carry on the suit. Chastelain & Ponvert could not be made parties to the action, holding no title to the premises involved in the litigation, and had they not intervened, the defense would have fallen through for want of means to present it. They were, at the time the agreement was made, conducting the defense. With these facts before the parties, they make provision for the expenses of the litigation in establishing the title by the joint and equal expense of Shelton and Ponvert and the defendant. The referee, upon the evidence before him, finds that the defense of the Dempsey suit was, in fact, assumed by Chastelain & Ponvert, and continued until the end of the litigation, and that they were the only parties who were defending the suit, for the purpose of establishing the title of Tylee to the premises. Although the assignees were not parties to the record, it is enough that Chastelain & Ponvert assumed the defense of the suit, and that fact being well known when the mutual covenant was made for paying the expenses, it cannot be said that the defense was to be conducted at the expense of the assignees.

Before the decision of the court of appeals, in the case of Belmont v. Ponvert, it had been decided in this court (3 *Jones & Spencer*, 208), that Mr. Belmont under the agreement, acquired no right or interest in the rents, and that he must look exclusively for the payment of his judgments to a sale of the premises.

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The decision in the court of appeals is in conflict with this decision in respect to such rents, and is to the effect that such rents were applicable to the payment of the judgments held by the defendant in addition to the proceeds of sale—that the rent of the premises received stands on the same footing under the agreement as proceeds of sale. The court say: “These rents were the fruits of the litigation with Jane Dempsey, as clearly as would be the proceeds of a sale of land. It is not disputed that the title which Ponvert obtained to the land, was held by him for the benefit of the parties to the agreement, at whose expense the litigation had been carried on; and it is difficult to see any ground on which those rents, obtained as an incident to that title, should take any different course from the proceeds of sale.” Opinion of the court of appeals by RAPALLO, J., reported 63 *N. Y.* 547.

By the express terms of the agreement, the proceeds of the property are to be applied to the payment of the mortgage decree, the judgments and the balance to Chastelain & Ponvert and Shelton, and no portion of the proceeds of the property are to be devoted to the payment of expenses. The logical result of the decision of the court of last resort is, that the plaintiff is to recover the value of the services of attorney and counsel in procuring those rents, as well as for the services in the Dempsey suit. It is difficult to see how the defendant, after receiving full payment of his judgments, can avoid contribution to the expenses of the litigation which by his covenant he agreed to make. The referee is fully sustained by the facts in evidence, and by the law of the case in allowing the claims of the plaintiff.

The decision of this court (3 *Jones & Spencer*), that Mr. Belmont, under the agreement, acquired no right or interest in the rents, and that he was to look exclusively for the payment of his judgment to a sale of the premises, possibly misled the learned referee. He

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therefore, I think, improperly deducted one-half the amount paid by plaintiff for the services of General Sandford in procuring those rents. I also think he erred in disallowing the sums paid to certain other parties, whose services stand upon the same footing as General Sandford's.

If these views be sound, it follows that the referee was not authorized in making the foregoing deductions, and it must be held, that the services in obtaining those rents, were to be compensated at the joint costs of all the parties to the agreement.

The judgment must therefore be reversed, and a new trial ordered with costs to abide the event.

CURTIS, Ch. J., concurred.

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ALBERT ZIMMERMAN, *et al.* PLAINTIFF AND RESPONDENT, v. THE NATIONAL STEAMSHIP COMPANY, DEFENDANT AND APPELLANT.

I. WITNESS.

1. IMPOSSIBILITY OF FACTS SWORN TO, DISCREDITING BY.

(a) *Impossibility in part only, not.*

Where the evidence shows that the fact sworn to is in part true and in part erroneous, arising from mistake or miscalculation or excusable exaggeration, the witnesses, as to the fact, are not wholly discredited.

II. REVERSAL OF JUDGMENT.—WHAT NOT CAUSE FOR.

1. *Verdict for less*, than plaintiff is indisputably entitled to, is not cause for reversal on appeal by defendant, if that be the only error.

Before SEDGWICK and SPEIR, JJ.

*Decided May 8, 1877.*

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Appeal from a judgment entered on a verdict in favor of plaintiff, for \$482.

The action was to recover the value of certain china, glassware, and a few other articles, shipped by plaintiff on one of defendant's vessels, for carriage to New York, which defendant failed to deliver.

The plaintiff's witnesses testified that the china, glassware, and other articles in question were of the value of \$650, and had been packed in what they called a barrel. A portion of the china was referred to as being "one fine English china dinner set, complete, painted blue and gilt with flowers, value \$150."

The glassware was referred to as "one full set of cut glass decanters and glasses, one dozen sherry glasses, one dozen champagne glasses, one dozen liquor glasses, two decanters, value \$75."

There was testimony on the part of the defendant, that this glassware alone would fill a barrel; also that a complete dinner set consisted of 150 pieces, and that it would fill a cask of 20 cubic feet. There was evidence on the part of the plaintiff showing that china was usually packed in casks, and tending to show that the largest sized casks would contain all the articles, even taking the dinner set at 150 pieces; that a complete dinner set might consist of 100 pieces or less, and that that which plaintiff's witnesses called a barrel, was a large sized cask. One of the witnesses testified that he had seen casks in china manufactories, and always imagined a cask to be a very large barrel, and would speak of it as a barrel of china; and the rate of freight paid tended to show that that which was shipped, by whatever name it might be called, contained 20 cubic feet. There was no evidence as to the value of the articles, except that given by the plaintiff's witnesses.

There was also a question as to whether a special

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Appellant's points.

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agreement had been entered into, limiting defendant's liability to \$5.

The defendant's counsel requested the court to charge "that if the jury believed the testimony as to the utter incapacity of the package to contain the sworn contents, it will discredit all the testimony of the plaintiff, and authorize a verdict for nominal damages."

The court refused so to charge, and defendant's counsel excepted.

The court, in one part of the charge, instructed the jury, that if the special agreement were not made, the defendant "was liable for the amount of the goods shipped." And in another part, "for the actual value of these goods."

The jury rendered a verdict for plaintiff for \$482.

*B. C. Chetwood*, attorney, and of counsel for appellant, urged:—I. The verdict is clearly not only against the evidence, but also in the teeth of the judge's charge. 1. By the evidence *uncontradicted* the plaintiffs should have recovered \$741, or thereabouts. 2. If they failed to recover that amount, the only other sum mentioned was, "five pounds sterling." 3. If the jury believed the testimony of defendants, they could find only *nominal damages*.

II. The judge charged them in terms to find, if they found at all for plaintiffs, either, 1. Amount claimed in complaint with interest; or, 2. The equivalent of five pounds sterling, in United States currency. The jury set at naught the evidence, and turned a deaf ear to the instructions of the court, and found an utterly unsupported verdict for \$482.16. "Where the amount of a verdict is determined by mere conjecture, and is not based upon any calculation warranted by the testimony, it will be set aside as unsupported by sufficient evidence" (*Bauder v. Lasher*, 5 *Lans.* 335). "To justify

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Respondent's points.

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a verdict, the law requires such proof as will leave no reasonable doubt of the existence of the fact upon which it must rest" (Sheldon v. Hudson River R. R. Co., 29 *Barb.* 226; see also Lough v. Romaine, 4 *J. & S.* 332; McDonald v. Walter, 40 *N. Y.* 551).

III. Apart from all mistake on the jury's part, we conceive the appellants have a good exception to the judge's refusal to charge as requested. It is entirely within the principle of the charge, and undoubtedly defendants were entitled to have it charged, as requested. If explicit instructions are refused when asked to be given \* \* \* it is a cause for a new trial (Green v. Hudson River R. R. Co., 33 *Barb.* 25).

*John M. Bowers*, attorney, and of counsel for respondent, urged:—I. As to the claim that the defendants over valued their goods, and that such articles could not have been contained in the lost cask. The plaintiffs were Germans, and innocently speak of the package lost as a "barrel;" and the defendants seek to prove that the plaintiff Albert Zimmerman spoke of it to the witness Losee as an "ordinary flour barrel," seven cubic feet in size, and then called several witnesses, Rogers, Noonan and Alcock, to prove that such a barrel could not have contained all the articles testified by the plaintiffs to have been in the package lost. Each of these witnesses, however, states that casks are very much larger than barrels, and one of them, Noonan, says that a cask would have contained all the articles named. Each of them also states that if they had seen the package lost, they could have at once said whether it was a barrel or a cask. There can be no question but that it was a cask. It was so spoken of by Boumphrey, one of defendant's witnesses, who says it was a cask; and by Titherington, another of defendant's witnesses, who says it was a cask. Both these witnesses resided at Liverpool, and both saw the lost package. The cargo



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book of the defendant also speaks of it as a cask ; and in the parcel receipt counterpart it is also spoken of as a cask. Both these exhibits were written by parties who saw the parcel. No other person who ever saw the cask gave testimony at the trial. The whole matter was properly submitted to the jury as a question of fact, and this court will not interfere with their verdict.

II. The verdict could not, in any event, be set aside as against the weight of evidence, as the defendants made no motion for judgment (*Peake v. Bell*, 14 *N. Y. S. C. R.* [7 *Hun*] 454, and cases cited).

BY THE COURT.—SEDGWICK, J.—The request to charge implied that in the case specified, the jury would have no right to say that there was any credible testimony as to what the package contained. This is not a necessary result, for the jury had the right to perceive that the plaintiffs' testimony was in part true, and the defendant's testimony did not go the length of showing that the package could not have contained china of some value, to more than a nominal amount.

The judge instructed the jury (after leaving the question of liability of only £5, to them properly) that if that special agreement were not made, the defendants "were liable for the amount of the goods shipped," and in another place "the actual value of these goods." The learned counsel for appellant supposes that this charge strictly held the jury to find a verdict in the amount sworn to by the plaintiffs' witnesses, which was materially greater than the verdict. If it be the case, that the only error is that the jury did not find an amount as great as the evidence indisputably shows, then the verdict might be increased to the proper amount. The finding of the jury was not hurtful to the appellant, and cannot be complained of by it. The fact that the jury did not find the larger amount, shows that in their discrimination, they believed that the

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quantity was less than the witnesses testified to, from a mistake, a miscalculation of the fullness of the sets of china, or from excusable exaggeration, but not necessarily from intentional falsehood.

I am of opinion the judgment should be affirmed with costs.

SPEIR, J., concurred.

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**JAMES LALLY, PLAINTIFF AND RESPONDENT, v.  
JAMES B. COLGATE AND ROBERT COLBY,  
DEFENDANTS AND APPELLANTS.**

**I. CHECK, PAYABLE IN GOLD, MADE WITHOUT CONSIDERATION.**

**1. BONA-FIDE HOLDER FOR VALUE.**

**(a) PAYEE, WHEN HE IS, SO AS TO ENTITLE HIM TO  
RECOVER FROM THE MAKER.**

1. Where the maker drew his check for the purpose of making a gold loan, and without receiving at the time any consideration therefor, but relying on the promise of a third person to return its equivalent in currency, at the market rate of gold, on that day, by means of a currency check of the payee, and afterwards to adjust any fluctuation in the market value of gold occurring pending the loan in the mode usual in the case of loans of gold, delivered it to such third person for the purpose of being used by him to settle a rate of gold between him and the payee on a sale of coffee—(Such settlement is termed a conversion of the price of goods sold on credit from a gold to a currency price. One of the modes of effecting a conversion, and the one adopted in this case, is : A gold account is opened, then a note is taken for the approximate amount of the sale in currency. When the conversion is made the purchaser sends gold for the amount of the invoice, and receives from the seller an equivalent amount in currency

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at a fixed premium mutually agreed on, being ordinarily the ruling rate of gold at the time the conversion is effected; the gold account is then balanced by cash; a currency account is then opened wherein the purchaser is debited with the currency received by him for the gold, and credited with the approximate notes; upon payment of the notes and whatever balance there may be on the currency account in favor of the seller, that account is balanced and the merchandize paid for). Such third person used the defendant's check for settling the rate of gold between him and the payee, and received the payee's two currency checks, drawn to his order, for an equivalent amount in currency, at the premium which was the ruling rate of gold at that time. One of these currency checks he indorsed and delivered to the drawer of the gold check, the other one he did not. The drawer of the gold check received and deposited the currency check delivered to him, and stopped payment of his gold check. The payee of the gold check had no notice or knowledge of the arrangement made between its drawer and the third person as to the manner in which it was to be paid for.

HELD,

the payee of the gold check was a *bona fide* holder for value without notice and entitled to recover from the drawer.

## II. NOTICE.

### CHECK PAYABLE TO A PAYEE WHO HAD NO DEALINGS WITH DRAWER, EFFECT OF AS NOTICE.

In the above put case the fact that the check was drawn to the payee's order when he had no dealings with the drawer, was not such notice to him that the gold check had not been paid for as to put him upon inquiry and make the check valueless to him until he had sent his currency check to the drawer of the gold check.

## III. MAXIM.

1. The maxim that "When one of two innocent persons must suffer by the wrong of another, the one who enables such other to commit the wrong must suffer the consequences," *applied*.

## IV. GOLD LOANS.

1. Mode of effecting and repaying stated.

## V. GOLD SALES ON CREDIT.

1. *Conversion of gold price into currency price, one of the modes of stated.*

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Before CURTIS, Ch. J., SANFORD & FREEDMAN, JJ.

*Decided May 8, 1877.*

The appeal was taken from a judgment entered in favor of plaintiff against defendants, upon the report of a referee.

The case was tried before Henry E. Howland, as referee.

The facts of the case, as well as the law bearing on them, appear in the referee's opinion, which is as follows :

"This is an action on a gold check drawn by defendants to plaintiff's order on the Bank of New York, dated April 8, 1873, for \$5,123.50, payable in gold, and amounting in currency to \$6,045.73.

"The check was made and received under the following circumstances :

"The defendants, who are bankers and extensive dealers in gold in New York city, on April 8, 1873, made what is called a 'loan' of gold of the amount of \$5,123.50 to the mercantile firm of R. M. Bishop & Co., of Cincinnati, Ohio, through their agent, James A. Robinson, a merchandize broker residing in New York city. Robinson received the gold from the defendants for account of R. M. Bishop & Co., in the form of the check in suit to the order of the plaintiff, promising them to return its equivalent in currency at the market rate of gold on that day by means of a currency check of the plaintiff, stating that he wanted the gold to settle a rate of gold between the plaintiff and said R. M. Bishop & Co., any fluctuation in the market value, occurring pending the loan, to be afterwards adjusted in the mode usual in the case of loans of gold, which are effected as follows : The borrower receives the gold and gives an equivalent in currency, either in bank notes or

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a currency check, according to the value of gold at the time. When the loan is returned the borrower returns the same amount of gold that he borrowed, and the lender gives back the same amount of currency which was paid by the borrower. If gold is actually returned, there is no adjustment except to receive back the currency; but if the borrower subsequently buys the gold of the lender, there is an adjustment, in case the price at the time of the purchase is different from the price at which the loan was made; if gold is lower at that time, the borrower receives a difference in currency; if higher, he pays a difference in currency.

“The check was delivered to Robinson in the defendants’ office in Wall street.

“Subsequently, and on the same day, Robinson, as a broker acting for said R. M. Bishop & Co., delivered the said gold check to the plaintiff, who was a merchant in coffees and other merchandize in New York, for the purpose of effecting a ‘conversion of the price of coffees previously sold by the plaintiff to said R. M. Bishop & Co.,’ on credit, from a gold price to a currency price.

“One of the usual modes for effecting a conversion in the trade, and the mode adopted in this case, is as follows: The goods having been sold for gold on credit, and notes taken for the approximate amount in currency, the purchaser sends the gold for the amount of the invoice, and receives from the seller an equivalent amount in currency at a fixed premium mutually agreed upon, that being ordinarily the ruling rate of gold at the time the conversion is effected. There is then a transfer of the account from a gold to a currency account on the books of the seller, and from that time the charge stands in the currency account alone, and is balanced off in the gold account, and the credit continues until the notes become due.

“The delivery of the gold check was made at the

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plaintiff's office, and the plaintiff, for the purpose of such conversion, gave to said Robinson his two currency checks on the Fourth National Bank of the city of New York of that date, for the equivalent of said gold in currency, one for \$3,045.73, and one for \$3,000, both drawn to the order of Benjamin P. Davis, the plaintiff's bookkeeper, and by him indorsed to the order of said J. A. Robinson at his request. On the same day the plaintiff deposited the said gold check in the Fourth National Bank for collection. The plaintiff had no dealing or negotiation with the defendants, and no knowledge of said Robinson's promise to them to deliver his currency check to them on account of their loan to Bishop & Co., but he credited the amount of the gold check to Bishop & Co., upon the price of his said sale to them.

"The following morning, April 9, the defendants received from Robinson one of the plaintiff's said currency checks for \$3,045.73, indorsed by him to their order, inclosed in a letter written by him to their gold clerk, admitting his default in not returning the residue. They indorsed and deposited the said check in their bank for collection, and stopped payment of their gold check then held by the plaintiff. Robinson had drawn the money on the currency check for \$3,000, received by him from the plaintiff on the afternoon of April 8. The plaintiff first learned that payment of the gold check had been stopped on the afternoon of April 9.

"On April 29, 1873, after the commencement of this action, the defendants returned to the plaintiff \$3,045.73 in currency, under a stipulation that the same should not affect the rights of either party in this action, which is now prosecuted for the balance of the currency value of said gold with interest.

"There is no doubt that the two transactions of April 8, viz. : the loan of the gold by Colgate &

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Co. to Bishop & Co., and the conversion of the price of the coffees bought by Bishop & Co. from a gold price into a currency price, though effected by the same broker were separate and distinct transactions, and that as between the plaintiff and the defendants, there was no privity.

“It is in proof that the broker, Robinson, stated when he effected the loan from defendants, that he wanted it to settle the price of coffee for Bishop & Co. with the plaintiff, and promised to bring back the plaintiff's currency checks at a future time. The plaintiff, however, was no party to this agreement between Robinson and the defendants, and could not be supposed to know anything about it.

“Was the fact that the check was drawn to the plaintiff's order such a notice to him that the gold had not been paid for, as to put him upon inquiry, and make the check valueless to him, until he had sent his currency check to the defendants ?

“The plaintiff was entitled to this amount of gold from R. M. Bishop & Co., and it was brought to him by Bishop's broker, in order to effect the conversion from gold into currency in the manner usual and customary in the trade. It was proved by all the experts called upon the trial, that deliveries of gold in New York city were effected either by delivery of gold coin, gold certificates, gold coupons or gold checks.

“The plaintiff, therefore, received this gold in one of the usual forms of delivery, and although it was in the form of a check drawn by a third person with whom he had no dealings, still it was the check of a well known dealer in gold, a firm as prominent in Wall street, as dealers in gold, as any bank ; perhaps more so. And there was no evidence of notice brought home to the plaintiff, that the check had not been paid for at the time it was brought to him. And it was delivered to him as so much gold. The plaintiff had a right

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to presume that it had been paid for, or that the check had been drawn to his order to simplify the transaction, as it was intended for him. Such a course is not unusual, according to the testimony in this case.

“The testimony of experts to prove a custom has failed to establish an universal and well recognized custom.

“It depends, according to the witnesses, upon the circumstances of each case, and they nearly all agree that it is customary to draw checks to the orders of parties other than those who pay for them. A similar transaction to this case was proved to have been effected with Bowie, Dash & Co.; and the taking of Lally's check in this transaction, and depositing it on Robinson's indorsements, tends to affirm the transaction.

“To establish usage, it must be well known and recognized, and so clear as to leave no doubt as to the existence, extent and meaning of the usage (*Dawson v. Kittle*, 4 *Hill*, 107).

“Most of the expert testimony related to cases where there were direct dealings between the parties, as in the case of deliveries of stocks, sterling exchange, &c. Here there were no direct dealings between the plaintiff and the defendants; they owed no duties to each other; they were each dealing with another party through the same broker, and their duties were between themselves respectively and that third party. The fluctuations in gold, on the gold loan, were to be settled by Colgate & Co. and Bishop & Co., and the questions of Robinson's agency and right to receive the currency checks of Lally were to be settled between Lally and Bishop & Co.

“If Colgate's check had been paid at the bank to Lally, no action could have been maintained for the recovery of its amount; for Lally would have been a *bona fide* holder for value; even if there were negligence on



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Appellant's points.

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his part, he was entitled to hold it (*Welch v. Sage*, 47 *N. Y.* 143).

“Both the parties to this action having acted in good faith, it may be difficult to say which should suffer the loss ; but the defendants having so far clothed the defaulting broker with the indicium of ownership of the check, by giving him possession of it without any sufficient notice to the plaintiff that it had not been paid for, or that Robinson or his principals, Bishop & Co., had no funds in their hands against which the check had been drawn, must be held liable to the plaintiff for the amount with interest (*Barnard v. Campbell*, 55 *N. Y.* 456 ; *Cartwright v. Wilmerding*, 24 *Id.* 521 ; *Weaver v. Barden*, 49 *Id.* 286 ; *Moore v. Met. Nat. Bk.*, 45 *Id.* 41 ; *McNeil v. Tenth Nat. Bk.*, 46 *Id.* 325).

“HENRY E. HOWLAND, Referee.”

*F. F. Marbury, Jr.*, attorney, and *F. F. Murbury*, of counsel for appellants, urged :—I. The check of the defendants was given to Robinson at his request, to be used in the conversion of gold into currency, in a transaction between the plaintiff and R. M. Bishop & Co., of Cincinnati. It was to be paid for in its equivalent in currency, by the check of the plaintiff to the order of the defendants. Defendants' check was drawn to the order of the plaintiff, and the plaintiff, in paying for it, should have drawn his check or checks to the order of the defendants. The checks were negligently drawn to the order of Robinson.

II. If the defendants had intended to trust Robinson, or his firm, the gold check would have been drawn to his or their order, but this was intentionally avoided. The delivery to Robinson of certificates or of gold, was expressly refused, and to prevent any loss, the precaution was adopted of drawing the check to plaintiff's order.

III. The defendants did not owe plaintiff anything,

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Appellant's points.

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and when the check was delivered to him, payable to his order, it was notice to him, that the check back should be drawn to defendants' order. The slightest caution or consideration on the part of Davis would have prevented any loss.

IV. If, instead of drawing two checks to the order of Robinson, one of the members of the firm of Robinson & Rockwell, to accommodate him, as Mr. Davis states, he had drawn the check to defendants' order, or even taken the trouble to send or go up to their office, and inquire whether he was doing right, all this trouble would have been avoided. But he made the mistake of yielding to Robinson, who was just getting ready to abscond. It was an additional impropriety to draw a check to the individual order of Robinson, one of the members of a firm.

V. Mr. Davis had no right to draw these checks to the order of Robinson. When Robinson went to plaintiff's office, he did not bring a check payable to the order of himself or his firm, but to the order of the plaintiff. Plaintiff knew defendants owed him no gold, and the first idea which would occur to any prudent person would be, "I must pay defendants for this gold, or get their consent to the paying for it to any one else."

VI. Where one of two innocent persons must suffer from the fraud and misconduct of a third, he who enabled the wrong-doer to perpetrate the wrong must bear the loss. Plaintiff, through Davis, was the approximate cause of loss.

VII. Robinson did not have some, or the usual evidence of title. The check was not payable to his order, but to plaintiff's, and that for a reason and to exclude the idea that it was Robinson's property.

VIII. The title to the check was not in Robinson's, but another payee's name—the plaintiff's was expressly inserted. Robinson had no control over, nor could he

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Respondent's points.

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use the gold check. It was drawn to the order of the plaintiff, and by him only could be used.

IX. Mere possession of a check, drawn to the order of a third person, does not clothe the person having possession, with the *indicium* of ownership.

X. The rule in regard to the discount or sale of negotiable paper cannot control this case. It rests upon its own peculiar facts and circumstances. If Robinson had taken a check payable to his own order, and negotiated it to a *bona fide* holder for value, the rule would apply.

XI. As to the relations between defendants and R. M. Bishop & Co., there was no credit given or expected, except to the extent of the fluctuations in the premium of gold. On all these conversions of gold accounts into currency ones, the giving of the gold and the taking back of the currency were to be simultaneous. The mode of conversion is referred to in Davis' testimony. Robinson & Rockwell or Robinson were only to arrange for the conversions.

XII. The preponderance of evidence as to usage is decidedly in favor of defendants, and this must be so from the nature of the case. The usage as testified to by defendants' witnesses is, that where gold is delivered to a party in the form of a check, payable to his order, the currency check in payment for it is returned payable to the order of the party who drew the gold check. It would add frightfully to the risks of business if checks could be drawn to the order of any one who delivers gold or stock, instead of to the order of the parties from whom the stocks or gold in point of fact came. In this case there was express and distinct notice that gold came from defendants, who alone were the parties entitled to receive payment therefor.

*Joseph A. Welch*, attorney, and of counsel for respondent, urged :—I. The defendants wholly failed to

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Respondent's points.

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prove a commercial usage in New York, requiring the plaintiff to communicate with them before receiving the gold check. All the witnesses on this subject agree that it is usual to issue gold checks drawn to the order of third persons, and collect for them from the immediate purchaser or borrower ; and to receive gold checks drawn payable to the party receiving them, for the account of the party immediately delivering them, and pay that party for them, and not the drawer.

II. Had the procurement of the gold check from the defendants been effected by a fraud on the part of Robinson, even that fact would not constitute an equity in their favor against the plaintiff, who is a *bona fide* holder for value (*Clothier v. Adriance*, 51 *N. Y.* 322 ; *Paddon v. Taylor*, 44 *Id.* 371 ; *Barnard v. Campbell*, 58 *Id.* 73). (a) The title of the plaintiff to this check could only be impeached by proof of bad faith in him in taking it (*Welch v. Sage*, 47 *Id.* 143 ; *Belmont Bk. v. Hoge*, 35 *Id.* 65 ; *Hoge v. Lansing*, *Id.* 136 ; *Magee v. Badger*, 34 *Id.* 247).

III. But, the defendants are estopped by their own act from asserting against the title of the plaintiff any supposed equity that they may have had against their immediate purchaser. The check intrusted to Robinson was used by him exactly in accordance with the defendants' instructions. The present is not merely the ordinary case of apparent ownership, or apparent *jus disponendi* ; it is one of actual *jus disponendi*, if not of actual ownership. To employ the ordinary formula of the decisions, the defendants have so acted, that the natural consequence of their act has been to influence the plaintiff to change his conduct to his damage ; and they are chargeable with an intent, and even a willful design, to induce him to believe them and to act on that belief (*Preston v. Mann*, 25 *Conn.* 118 ; *McNeil v. The Tenth Nat. Bank*, 46 *N. Y.* 325 ; *McWilliams v. Mason*, 31 *Id.* 302 ; *Van Dugen v. Howe*,

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21 *Id.* 531; Clothier v. Adriance, 51 *Id.* 322; Crocker v. Crocker, 31 *Id.* 507; Driscoll v. W. B. &c. M. Co., 59 *Id.* 97; Porter v. Parks, 49 *Id.* 565; Weaver v. Barden, *Id.* 286; Moore v. Met. Nat. Bk., 55 *Id.* 41; McNeil v. Tenth Nat. Bk., 46 *Id.* 325; Seybel v. Nat. Cy. Bk., 54 *Id.* 288; Ledwich v. McKim, 53 *Id.* 307; Turnbull v. Bowyer, 40 *Id.* 456; N. Y. & N. H. R. R. Co. v. Schuyler, 34 *Id.* 59, 60; Preston v. Mann, 25 *Conn.* 118).

BY THE COURT.—FREEDMAN, J.—After a full and critical examination of the whole evidence, I am unable to see how the judgment can be disturbed. The cause has been fully and fairly tried. The findings of fact made by the learned referee, are supported by an overwhelming preponderance of the evidence; his conclusions of law are a correct determination of the rights of the parties arising from the facts as found, and the opinion delivered with his report is such a complete and correct exposition of the law of the case, that in my judgment, it is unnecessary to add anything to it.

The exceptions to the referee's findings and his refusals to find are clearly untenable, and the exceptions to his rulings, on questions of evidence, appear to be equally so.

The judgment should be affirmed, with costs.

CURTIS, Ch. J., and SANDFORD, J., concurred.

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Statement of the Case.

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SPECIAL TERM, NOVEMBER, 1877.

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RITTERBAND, RECEIVER, ETC., v. BAGGETT AND  
OTHERS.

## I. CORPORATIONS.

## 1. COTTON EXCHANGE.

1. *Membership in, constitutes property*, which is subject to be applied to the payment of the debts of the member.
2. *Restrictions on assignment of membership, by the by-laws, effect of.*
  - (a) NOTWITHSTANDING a by-law whereby an assignment can be made only to a member, or a member elect, the membership *constitutes property*; such by-law merely affects the use of the property.
3. *Compulsory application, how made.*
  - (a) The court may appoint a receiver of a member's property, and then compel an assignment to such person (being a member or member elect) who shall become a purchaser from the receiver, or to a member or member elect, in trust, to assign to such person (being a member or member elect) who shall become a purchaser from the receiver.

## 2. BY-LAWS.

1. Restrictions by, on sale or assignment of shares or right of membership, effect of.
  - (a) *Does not destroy the character or incident as property*, which such shares or right of membership otherwise had.

Before SPEIR, J., at special term.

This was an action in equity by a receiver of a judgment debtor, appointed under supplementary proceedings, against the judgment debtor and his assignee in bankruptcy to compel an assignment of a seat held by the judgment debtor in the Cotton Exchange

Macaulay & Co., on April 16, 1874, recovered a judgment against the defendant Baggett, for the sum

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Statement of the Case.

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of \$2,408.60, and issued execution thereon, which was returned unsatisfied, and supplementary proceedings were instituted resulting in the discovery of the property sought to be reached by these proceedings. The plaintiff, on July 17, 1874, was duly appointed receiver, and all the personal property capable of manual delivery which the defendant Baggett then had, was transferred in title to the receiver excepting such property as is exempt by law from execution.

The New York Cotton Exchange was organized by an act of the legislature of the State of New York, passed April 8, 1871, for business purposes in the city of New York. The membership is elective with certain provisions for a right to sell and assign the seat in the board subject to an election of the purchasing member by the board. The initiation fee for membership of the exchange is fixed at \$5,000, and for which a certificate of membership is issued. On the surrender of this certificate to the treasurer a transfer may be made by him to a member or member elect only, notice of the intention to transfer having been duly posted in the exchange room for ten days, and no unsettled claims to members of the exchange having been presented against the party transferring. The treasurer is to be paid \$100 for each transfer. The legal representatives of any deceased member may transfer such membership. By the charter the exchange is authorized to take and hold by grant, purchase or devise real and personal estate to an amount not exceeding \$300,000, for the purpose of the association. The result is that as the number of members is limited and the dues are large, the right to a seat at the board has a money value. When a member fails to perform his contracts or becomes insolvent he can no longer be a member of the board until he resumes payment, including all penalties and charges, but his seat may be sold for his benefit or that of his creditors among the other mem-

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Statement of the Case.

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bers of the board. When a sale of the rights of membership is made, the sale is to be made by the superintendent of the exchange to the highest bidder at the exchange room, after ten days' notice posted on the bulletin in the room. Any member may purchase the rights of membership of any other member which shall give him the right to sell the same to any other member or members elect.

About eight or ten months subsequent to the appointment of the plaintiff as receiver, the defendant Baggett, who before had become a member of the exchange, was declared a bankrupt, and the defendant, George H. Fletcher, was appointed his assignee. Thereupon a motion was made to compel the defendant Baggett to make an assignment of his seat to the assignee of the receiver, as the receiver, according to the rules of the cotton exchange, could not take such assignment personally, he being neither a member nor member elect. The demand for an assignment was based upon an offer which he had received from a Mr. Covas. On this motion the defendant Baggett claimed that the seat was not property, and that the assignee should be made a party. An order was duly made and entered by the court, making the assignee in bankruptcy a party, as necessary on the question of compelling such an assignment to be made. Hence, upon leave being granted, this action was commenced to compel Baggett to assign to a person to be designated by the receiver, from whom he may have received or should receive, an offer, according to the rules of the cotton exchange for his seat therein.

*Simon Sterne*, of counsel, for receiver.

*E. R. Olcott*, of counsel, for Baggett.

*Francis M. Scott*, of counsel, for Cotton Exchange.



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Opinion of SPEIR, J.

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SPEIR, J.—The appointment of plaintiff as receiver of Baggett, made in the supplemental proceedings under the Code, vested in him the legal title to all the personal property of Baggett. By force of the statute, Code, § 298, the receiver of the judgment debtor is subject to the direction and control of the court in which the judgment was obtained, upon which the proceedings are founded. This action was commenced by leave granted by this court, and the receiver's appointment confers upon him the right to compel a discovery on defendant's oath of all his property. I am of the opinion that the seat in the cotton exchange was an incorporeal right which Baggett had at the time he became bankrupt, and was, in the fullest sense property, and that the franchise and privileges secured to the exchange by its charter and the high price of the initiation fee, show that it was valuable property. Nor can I doubt that, had there been no supplemental proceedings under which a receiver was appointed, it would have passed subject to the rules of the cotton exchange to his assignee in bankruptcy, and if there had been left in the hands of the members of the board any balance after paying the debts due to the members, and all penalties and charges, that balance might have been recovered by the assignee. The question whether the seat in the board was property has been fully settled in a late case, almost if not entirely identical with the case at bar (*Hyde v. Woods*, 4 *Ott.* 524). It is there held that a seat in such a board is not a matter of absolute purchase. That there is no reason why the stock board should not make membership subject to the conditions and rules of the board unless it is a violation of some statute or some principle of public policy. The reason given is sound: "that the rule entered into and became an incident of the property when it was created, and remains a part of it into whose hands soever it may come" (see also *Nicholls*,

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Opinion of SPEIR, J.

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&c. v. Eaton, 91 *U. S. R.* 716). The question being settled that the seat in question is property of value, I think it is the duty of the court to enforce its transfer for the plaintiff's benefit in this action either to a receiver or to a third person qualified to work out the designs of the law. We have seen that the personal estate of the debtor becomes vested in the receiver from the time and by virtue of his appointment. The entry of the order appointing the receiver, places the title of all the personal property in him. The provisions of the Code relating to supplemental proceedings were enacted for the purpose of making the property of the debtor available assets in his hands to pay his debts. By a by-law of the exchange this property cannot be assigned to any one but members and to members elect. It cannot therefore be assigned to the receiver as he is neither a member nor a member elect. If this property cannot be reached by the receiver by reason of the restriction placed on its transfer by the by-laws of the cotton exchange, then, to this extent, the object and intention of the Code becomes not only a dead letter but lifeless in spirit. These restrictions, however, do not form an insurmountable obstacle. Rights of property from time immemorial could be reached by a creditor's bill, and it is now well settled that the same result may be accomplished by proceedings under the Code which furnish a substitute for that proceeding in chancery. Personal property passes to the receiver without assignment; but if an assignment be necessary to effect the purpose of the law, I do not question the power of the court to direct it to be done. It is not an indispensable requisite that such assignment should be made direct to the receiver. It may be made to such purchaser from him who is either a member or member elect of the exchange, or to a member or member elect to hold in trust to assign under the previous direction to said purchaser from him, or shall be

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either a member or member elect. I therefore direct an assignment to be made to Mr. Covas or some other competent and fit member of the cotton exchange with apt and proper directions.

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PAUL BATZEL, PLAINTIFF, v. OLGA BATZEL,  
DEFENDANT.

DIVORCE. A VINCULO.

TRIAL BY JURY OF ISSUES OF FACT IN ACTION FOR;  
RIGHT TO.

1. Each party has both a *constitutional and statutory right* to such trial.

(a) REFERENCE OR TRIAL BY THE COURT can not be compelled.

(b) WAIVER. The right to a trial by jury may be waived in the manner prescribed by section 1009 of the Code of Civil Procedure.\*

Sections 253, 266, 270, 271 of the Code of Procedure, Rule 40 (formerly 33) of the rules in force prior to January 1, 1878; sections 968, 969, 970, 1013, of the Code of Civil Procedure; chap. 15, of the report of the commissioners to revise the statutes to the legislature of 1877, 2 *Edm. N. Y. Statutes*, 150, 1 *Rev. Stat.* 145, § 40; 1 *R. L.* 197; art. 1, § 2, Constitution of 1846, and ¶ 1, of § 6, of the so-called temporary act of June 2, 1877, referred to, commented on, and compared, with the above result.

Before FREEDMAN, J., at special term.

*Decided November, 1877.*

Motion by plaintiff to vacate order settling the is-

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\* The point whether a failure to make a special motion for an order directing issues, to be tried by a jury, under the provisions of section 970 of the Code of Civil Procedure, and rule 31 of the present rules of court, would operate as a waiver of the right to a jury trial, was not involved, nor was it discussed or determined.

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Opinion of FREEDMAN, J.

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sues to be tried by jury, and for an order of reference of the issues.

The action is brought by the husband against the wife for a divorce on the ground of adultery.

The defendant, by her answer, denied the acts of adultery charged in the complaint.

Issue was joined August 15, 1877, and immediately thereafter defendant moved for an order, and on August 29, 1877, an order was granted and entered, directing the issues specified therein to be tried by a jury.

*Alfred Erbe*, of counsel, for the plaintiff.

*Frank Malvesay*, of counsel, for the defendant.

FREEDMAN, J.—The order directing the issue of adultery to be tried by jury was regularly made.

Section 253 of the Code, then in force, provided that an issue of fact in an action for a divorce from the marriage contract on the ground of adultery, must be tried by a jury, unless a jury trial be waived, as provided in section 266, or a reference be ordered as provided in sections 270 and 271. Section 266 provided that trial by jury might be waived, 1. By failing to appear at the trial; 2. By written consent, in person or by attorney, filed with the clerk; 3. By oral consent in open court, entered in the minutes. The reference referred to could not be compelled, but ordered upon the written consent of the parties.

In addition, rule 40 (formerly 33) provided as follows: "In all actions for a divorce, when issue is joined by the pleadings, upon the question of adultery, such issue shall not be tried by a jury until the issue to be tried shall be settled in like manner as in other actions, where issues arising out of the pleadings are required to be settled."

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Opinion of FREEDMAN, J.

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In the other actions thus referred to, if either party desired a trial by jury, he had to give, within ten days after issue joined, notice of a special motion for the settlement of the issues to be submitted to the jury.

The defendant in this case neither waived a trial by jury, nor did she consent to a reference, and as in all other respects she fully complied with the rule, her right to a trial by jury seems incontestable.

It is claimed, however, by the learned counsel for the plaintiff that the law upon the subject has been changed by the new Code of Civil Procedure which went into effect on September 1, last; that under that act a reference may be compelled by the court, and that this power extends to all trials had after the day named. Furthermore it is insisted that the evidence to be given on behalf of the plaintiff in this action is unfit for publication, and that for this reason, and in the interest of good morals, the court, in the exercise of the newly conferred power, should revoke the order of August 29, and substitute therefor an order of reference.

Section 968 of the new Code, it is true, in enumerating the actions in which the issues of fact must be tried by a jury, omits to name the action for a divorce, and such omission, as appears from the note of Commissioner Throop, was purposely made.

Equally true it is, that section 969 provides that an issue of fact, in an action not specified in the last preceding section, or wherein provision for a trial by jury is not expressly made by law, must be tried by the court, unless a reference or a jury trial is directed, and that under section 1013, all actions triable by the court without a jury, may be referred at the discretion of the court, and of its own motion, as well as upon the application of either party.

But the difficulty is, independently of the saving clause contained in paragraph 1 of section 6, of the so-

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Opinion of FREEDMAN, J.

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called temporary act of June 2, 1877, first, that an action for divorce on the ground of adultery is one in which provision for a trial by jury is expressly made by law, and that consequently it falls within the exception contained in section 969 ; and secondly, that section 970 expressly provides that where a party is entitled, by the constitution or by express provision of law, to a trial by a jury of one or more issues of fact, in an action not specified in section 968, he may apply, upon notice, to the court, for an order directing all the questions arising upon those issues, to be distinctly and plainly stated for trial accordingly.

An action for divorce on the ground of adultery is one in which provision for a trial by jury is expressly made by law, because, though section 253 of the former Code was repealed by the repealing act accompanying the new Code of Civil Procedure, the repeal did not extend to the provision of the statute relating to divorces (2 *Edm. N. Y. Statutes*, 150, § 40), which makes it the duty of the court, if the adultery charged be denied, to direct a feigned issue to be made up for the trial of the facts contested by the pleadings, by a jury of the country at some circuit court.

The commissioners to revise the statutes, in omitting the action for a divorce from the provisions of section 968, did so because they intended to specially regulate the trial of such an action by a separate chapter. Their views upon this subject may be found in chapter XV of their report to the legislature of 1877 ; and in that the pre-existing right of trial by jury was preserved. The chapters subsequent to chapter XIII, however, failed to become law, and hence the statute above alluded to (2 *Edm. N. Y. Statutes*, 150), remains in force in its original form, and is to be taken together with sections 968, 969, and 970 of the new Code.

In addition to the statutory right thus existing,

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Opinion of FREEDMAN, J.

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there is also a constitutional right to a trial by jury, of which the defendant cannot be deprived without her consent. To make this clear, recourse must be had to the origin of the jurisdiction of the courts of this country over matrimonial controversies.

In England, the matrimonial law was, prior to the American Revolution, administered by the ecclesiastical courts. The English colonists carried with them to this country their own English laws, except such as were inapplicable to their altered relations and circumstances. But they did not carry with them the courts of the mother country. Consequently, during the time intervening between the establishment of the colony and of the courts, the laws remained practically inoperative. Though, therefore, the courts of England have specifically held that the matrimonial law of the ecclesiastical tribunals is a branch of the law which colonists take with them, yet, as we have no ecclesiastical courts, and never had them, even in colonial times, it is plain that no tribunal in this country can take jurisdiction of marriage and divorce causes, without the authority of a statute. When a statute has given the authority, the tribunal is to exercise it, under the regulations of the statute, according to the law as expounded by the ecclesiastical courts. But in so far as the cause of divorce or the course of procedure is regulated by statute, the contrary practice formerly prevailing in the ecclesiastical courts of England is abrogated.

In the State of New York jurisdiction over actions for the dissolution or suspension of the marriage contract was, by statute, conferred upon the court of chancery, and the act conferring the jurisdiction provided, that if the adultery charged be denied, the court should direct a feigned issue to be made up, for the trial of the facts contested by the pleadings, by a jury of the country at some circuit court (1 *R. L.* 197).

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Opinion of FREEDMAN, J.

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This provision relating to a trial by jury was incorporated into the revised statutes (1 *Rev. St.* 145, § 40 ; 2 *Edm. N. Y. Stat.* 150), and existed at the time of the constitution of 1846, which provides (art. 1, § 2), as the constitution of 1822 had previously provided, viz: "The trial by jury in all cases in which it has been heretofore used, shall remain inviolate forever." The word "heretofore," as used in this clause, means before 1846, and it cannot, to limit its meaning, be carried back to 1777, and confined to the cases which, at that early period, were triable by jury (*Wynehamer v. The People*, 13 *N. Y.* 378, 427, 458).

Although, therefore, the issue or issues evolved by the pleadings were, according to the course of the ecclesiastical law, tried, not by a jury, but by the judge, who decided all questions both of law and of fact, and although the practice of the court of chancery, as it existed while this State was a colony, dispensed with trial by jury in all cases, except when specially directed by the court, the issue of adultery was, in this State, always required to be specially submitted to a jury, and at this time it must be so submitted, unless a trial by jury be waived in some mode prescribed by law.

There being no waiver in the case at bar, the motion for a revocation of the order awarding issues and the substitution of an order of reference, must be denied ; and as the question presented is somewhat novel, the denial should be without costs.



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Opinion of the Court, by SPEIR, J.

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ALONZO BELL, PLAINTIFF, v. THE SUN PRINT-  
ING AND PUBLISHING COMPANY, DEFEND-  
ANT.

LIBEL.--PLEADING.—PARTIES, JOINDER OF.

Where the words charged as libelous, are not actionable *per se*, the plaintiff cannot give evidence of any loss or injury sustained by the publication, unless it be *specially* stated in the complaint; and in such case the plaintiff must allege and prove that he has suffered some pecuniary damage by reason of the libelous matter. The sole office of the *innuendo* is to explain. It cannot introduce new matter, nor in any degree enlarge the sense of the words to which it relates.

Where libelous matter is published concerning the wife, it is only when the action is maintained by reason of special damages to the husband that he can sue alone.

The words charged in the complaint as libelous, which are given at length in the opinion, held, not actionable *per se*.

Before SPEIR, J.

*Decided Dec. 26, 1877.*

The action was brought for the recovery of \$100,000 damages for an alleged libel, published in the *Sun*, April 18, 1877. Defendant demurred, on the grounds stated in the opinion.

*E. G. Bell*, for plaintiff.

*Willard Bartlett*, for defendant.

SPEIR, J.—The words in the complaint charged as

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Opinion of the Court, by SPEER, J.

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libelous are the following: "Civil service reform has its lapses in the Interior Department. The examining committee which sat on Saturday included Dr. Warren, Clerk of the Board of Education, and hurriedly indorsed for dismissal a list furnished by a bureau officer. It included Miss Maggie Warren, a sister of Dr. Warren, a fact which was not ascertained until yesterday. To-day she was reinstated. Another fact recently came to light in regard to Bell, now Assistant Secretary of the Interior. Last winter Mr. Duell, Commissioner of Patents, was dismissed for letting tracing be done by various persons under assumed names. Much scandal was occasioned at the time by this illegal procedure. It now appears that Bell's wife [meaning the plaintiff's wife] was one of those paid for this work in her maiden name." The following is the innuendo: "That the said defendant, by said publications, did charge and intended to charge this plaintiff with being guilty of having procured money for his wife from the United States Government for services illegally under an assumed name." The defendant presents two causes of demurrer to the first alleged cause of action: 1st. That it does not state facts sufficient to constitute a cause of action. 2. That there is defect of parties plaintiff in the non-joinder of the wife of the said Alonzo Bell. Although the complaint contains an allegation of general damages in its conclusions, to wit, "That by reason of said false, scandalous, and malicious publication, the plaintiff has suffered loss in his good name, fame, credit, and reputation, and has been brought into suspicion, public scandal, contempt and disgrace among his neighbors, &c., and has suffered damages thereby in the sum of one hundred thousand dollars," it does not contain any averment that the plaintiff has sustained any special damages. In an action for libel where the words are not actionable *per se*, the plaintiff cannot give evidence of any loss

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Opinion of the Court, by SPEIR, J.

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or injury which he has sustained by the publication, unless it be specially stated in the complaint. The language complained of is not actionable *per se*. When the words charged are not actionable of themselves, the plaintiff must allege and prove that by reason of the libelous matter he has sustained some pecuniary damages. As the sole office of the innuendo is to explain, it cannot introduce new matter, nor in any degree enlarge the sense of the words to which it relates. The publication complained of does not "charge the plaintiff of being guilty of having procured money for his wife from the United States Government, for services illegally rendered under an assumed name," as stated in the innuendo. There is no averment in the publication itself which can possibly be called libelous by any meaning of the words published having reference to the plaintiff, Bell. He is not charged with anything affecting him injuriously. Where there is no ambiguity in the language alleged to be libelous, no innuendo is required to give point to the meaning. The charge that the Commissioner of Patents was dismissed for permitting an illegal procedure does not affect Mr. Bell injuriously in any way. The most that can be said, so far as it concerns his wife, is that the Commissioner of Patents was dismissed for the illegal procedure of letting tracing be done by persons under assumed names, and that the plaintiff's wife was one of the persons paid for doing this work in her maiden name. If the Commissioner of Patents was guilty of this scandal, it is difficult to see how that affects Mr. Bell or his wife. Even if the demurrer admits that it concerns Mr. Bell, it does not constitute a libel upon him. If the words relate to his wife, the most they can mean is that in this alleged procedure she was allowed to do tracing work, for which she was paid in her maiden name. In business matters, a contract or obligation may be entered

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into by a person by any name he choose to assume. The law looks only to the identity of the individual (Doe v. Yates, 5 *Barn. & Ald.* 534; Waterbury v. Mather, 16 *Wend.* 611). It often occurs that a person is as well known by one name as another. In literature and the drama, writers and actors, being married women, are as well known to the public by their maiden names, as by the names they assume upon marriage. I am not aware that this practice or custom has ever been considered a defect or want of moral virtue, or the neglect of moral duty or obligation. Under the second ground of demurrer, the non-joinder of the wife, it is to be observed that even if the language complained of is actionable *per se*, the suit should be brought in the name of the husband and wife. It is only where the action is maintained by reason of special damages to the husband that he may sue alone. It is already apparent from the foregoing that there is nothing in the publication that affects the husband except by relation of his wife: Unless she be libeled there is not anything in the publication which entitles him to recover. The plaintiff is here claiming damages for a publication concerning a married woman, and which publication concerns him, because he is that married woman's husband. If he, therefore, brings the action without joining his wife as a party, he must admit that the publication is not actionable *per se*. If the publication is actionable *per se* he must admit there is a defect of parties, owing to the non-joinder of his wife. In either case the defendant is entitled to judgment on the demurrer.

**MEMORANDA**  
**OF**  
**CAUSES DECIDED DURING THE PERIOD EM-**  
**BRACED IN THIS VOLUME, AND NOT**  
**REPORTED IN FULL**

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**JAMES H. CARRINGTON, AND ANOTHER, PLAIN-**  
**TIFFS AND RESPONDENTS v. CHARLES E.**  
**WARD, AND ANOTHER, DEFENDANTS AND AP-**  
**PELLANTS.**

**Before CURTIS, Ch. J., and SPEIR, J.**

*Decided January 2, 1877.*

*Thomas H. Hubbard*, for defendants and appellants.

*William H. Arnoux*, for plaintiffs and respondents.

The plaintiffs, in July, 1870, held in possession one thousand one hundred and sixty-nine barrels, containing fifty-two thousand three hundred and thirty-nine gallons of oil, owned by one Compton, and subject to a lien of the plaintiffs to the extent of \$15 per barrel for advances made by them to Compton.

The plaintiffs, at the request of Compton, sold to the defendants one thousand one hundred and sixty-nine barrels, and were instructed by him to collect as

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Statement of the Case.

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delivered \$15 on each barrel, taking a receipt for the same from the defendants, and to credit them to the extent of \$5,000, if they should deem it advisable. The plaintiffs sold to the defendants six hundred and seventy-one barrels of the oil which were received by them and they paid the \$15 per barrel. They afterwards sold seventy-five barrels of the oil, and the defendants refused to pay the plaintiffs, claiming that Compton owed them, and they would credit him for the amount.

The court directed a verdict for the plaintiffs for the amount claimed with interest.

The defendants excepted, and brought this appeal.

SPEIR, J., wrote for affirmance, citing *Nottebohm v. Mast*, 2 *Roberts*, 249.

CURTIS, Ch. J., concurred.

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THOMAS C. CLARK, PLAINTIFF AND RESPONDENT,  
v. JOHN FLANAGAN AND JACOB A. GROSS,  
DEFENDANTS AND APPELLANTS.

Before CURTIS, Ch. J., and SPEIR, J.

*Decided Jan. 2, 1877.*

*Abel Crook*, for appellants.

*Geo. M. Curtis* and *Jas. R. Angel*, for respondent.

Appeal from judgment entered on verdict for plaintiff, and from an order denying defendants' motion for a new trial.

The points involved were : (1). Was there sufficient

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Statement of the Case.

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evidence to take the case to the jury? (2). Was the evidence such as not to sustain the verdict?

SPEIR J., wrote for affirmance with costs.

CURTIS, Ch. J., concurred.

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RUST, PLAINTIFF v. HAUSELT, *et al.*, DEFENDANTS.

Before SEDGWICK and SANDFORD, JJ.

*Decided February 5, 1877.*

Motion for leave to amend order of reversal, by inserting a direction for a new trial, agreeably to the decision of the court at general term, the same having been inadvertently omitted.

Motion granted upon terms.

Decision *per Curiam*.

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SUSAN L. HARRIS, PLAINTIFF, v. SIDNEY DILLON, *et al.*, DEFENDANTS.

Before CURTIS, Ch. J., and SPEIR, J.

*Decided May 8, 1877.*

A. H. Wagner, for plaintiff.

Alex. Thain, for defendants.

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Opinion of CURTIS, Ch. J.

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On the trial of this action, a verdict was directed for the defendants, and the plaintiff's exceptions ordered to be heard at the general term in the first instance.

The appeal involved only the consideration of testimony.

CURTIS, Ch. J., wrote for denial of motion for new trial, and that plaintiff's exceptions be overruled, and defendants permitted to enter judgment upon the verdict with costs.

SPEIR, J., concurred.

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JAMES W. PHYFE, PLAINTIFF, v. MICHAEL CAREY AND PETER MASTERTON, DEFENDANTS.

Before CURTIS, Ch. J., SEDGWICK and SPEIR, JJ.

*Decided May 8, 1877.*

*John Townshend*, for plaintiff.

*A. H. Reavey*, for defendant.

At the trial, the court directed a verdict for the plaintiff, and directed the exceptions to be heard in the first instance at the general term, and the judgment in the mean time suspended.

CURTIS, Ch. J., wrote that the defendant's exceptions should be overruled, and judgment ordered upon the verdict, in the plaintiff's favor, with costs.

SEDGWICK and SPEIR, JJ., concurred.



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Statement of the Case.

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JAMES D. FOWLER, AND ANOTHER, PLAINTIFFS  
AND RESPONDENTS v. JOHN KELLY, DEFENDANT  
AND APPELLANT.

Before CURTIS, Ch. J., SEDGWICK and SPEIR, JJ.

*Decided May 8, 1877.*

*Robert S. Green*, for appellant.

*H. Daily, Jr.*, for respondent.

Appeal from judgment entered on verdict for plaintiff.

The only point involved was as to whether the evidence was such as not to uphold the verdict.

SEDGWICK, J., wrote for affirmance with costs.

CURTIS, Ch. J., and SPEIR, J., concurred.

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JOHN LEHMAIER, *et al.*, PLAINTIFFS v. ALMON  
W. GRISWOLD, DEFENDANT.

Before CURTIS, Ch. J., and SPEIR, J.

*Decided May 8, 1877.*

*Lewis Sanders*, for plaintiffs.

*C. A. Runkle*, for defendant.

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Verdict directed for plaintiffs, and defendant's exceptions ordered to be heard at the general term.

*Per Curiam.*—Judgment for plaintiff on the verdict with costs.

# INDEX.

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## ACCEPTANCE.

See AGENCY; ESTOPPEL, 5.

## ACCOUNTING.

See MORTGAGE, 2; LANDLORD AND TENANT, 7.

## ACCOUNT STATED.

Where the defense to an action on contract is an account stated, errors or mistakes therein affecting the result may be shown.  
*Welsh v. Germ. Am. Bk.*, 462.

See BILL OF PARTICULARS, 1;  
PLEADINGS, 2.

## ACTION.

See BOND; LANDLORD AND TENANT, 7; LIBEL; MALICIOUS PROSECUTION; PENALTIES.  
TROVER, 3.

## AGENCY.

F and C entered into a contract whereby F agreed to convey to

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C certain premises. C directed F to make the deed to L. In pursuance of such direction F executed a deed conveying the premises to L and delivered it to C for L. This deed conveyed the premises "subject to a certain mortgage made by F . . . . which said mortgage the party hereto of the first part assumes and agrees to pay as part of the consideration hereinbefore expressed." L subsequently conveyed the premises to B by a deed in which her grantee agreed to pay said mortgage as part of the purchase money. In an action subsequently brought against F, L, B, and others, to foreclose this mortgage, the complaint alleged that F sold and conveyed the premises to L by a deed in which "the said L assumed said mortgage as part of the consideration on such purchase and agreed to pay the same." L, by her verified answer to this complaint, admitted that F sold and conveyed to her, and further alleged "and this defendant received the said deed and this defendant admits that this

defendant received said land subject to said mortgage," but she therein denied that she had ever agreed to pay the mortgage, and denied that under the deed to her she was bound to pay it. In that action judgment of foreclosure and sale was rendered on consent of her attorney which did not charge her with personal liability for any deficiency. *Held*, prima facie evidence that C was L's agent for the purpose of accepting the deed from F to her, and that by his acceptance L became bound to perform any agreement on her part contained in it. *Fairchild v. Lynch*, 265.

#### APPEAL.

1. Record evidence is received in the first instance on appeal to avoid technical defects, provided it is such as cannot be controverted; e. g., an order amending a sheriff's return nunc pro tunc. *Burnham v. Brennan, Sheriff, &c.*, 49.
2. The rules of the courts seek to secure cases and exceptions, properly settled and definitely determined, as to their form and contents, before coming before the appellate courts for consideration, and to give all parties opportunity to have the questions brought up fairly and accurately for review. If a party appellant prints, files and serves a case that is not the case as settled, a wrong is committed, and it is a necessary incident to the powers and jurisdiction of a court in the administration of justice, that it should have control over its files and records, to prevent their use wrongfully. And such control can be enforced by ordering case off the files of the court, &c., as in this case, in conformity with rules 10 and 44. *Tyng v. Marsh*, 235.
3. An appellate court in certain cases, will pass upon the weight of conflicting evidence. *Lynch v. Pyne*, 11.
4. Verdict for less than plaintiff is indisputably entitled to, is not cause for reversal on appeal by defendant, if that be the only error. *Zimmerman v. Nat. S. S. Co.*, 539.
5. When a witness, to a question put, volunteers incompetent evidence, no cause for reversal results therefrom. This, although the question put was improper, but the responsive answer made to it had no force as evidence. *O'Hagan v. Dillon*, 456.
6. The reception of incompetent evidence, which could not, by any possibility, have injured the party against whom it was given, is not cause for reversal. *Ib.*
7. Findings of referee as to value of attorney's services, where there is conflict of evidence as to value, must be affirmed. *Van Every v. Adams*, 126.

#### ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. The resignation of an assignee for the benefit of creditors must be made to the supreme court. Its acceptance, and the discharge of the assignee from the trust, and the appointment of his successor, are all matters for the action of said court. The property and trusts created by such an assignment cannot be transferred by the resignation of the trustee in favor of some one else, unaccompanied with the consent of the *cestuis que trust* or the order of the supreme court. *Keiley v. Dusenbury*, 238.
2. Although ordinarily the expenses incurred by an assignee for creditors in protecting and collecting the assigned assets, are

first payable out of the proceeds before distribution, yet, where the protection and collection is carried on and undertaken for the benefit of certain creditors, under an agreement whereby they were to share in the fruits in a certain specified manner, and bear the expenses, such parties are bound by their agreement, and cannot, although the litigation and proceedings were carried on in the assignee's name, claim that the expenses should be paid out of the proceeds before making the distribution called for by the agreement. *Ponvert v. Belmont*, 531.

See ATTACHMENT, 2; STATUTE OF FRAUDS.

#### ATTACHMENT.

1. In case of an attachment issued, in an action against copartners upon a firm debt, against one of the firm, only the right and interest of the partner against whom the attachment issued, in the partnership goods, which is the surplus remaining after the partnership debts have been paid, can be seized. *Doane v. Lindsay*, 399.
2. An agreement between attaching creditor and subsequent assignee of the firm, whereby in substance the assignee was to sell the attached goods, and the applicability of the proceeds to be determined by the court or otherwise, as the parties might agree, places the attaching creditor in the position of a purchaser of the attached interest at a sheriff's sale thereof. It appearing on the trial of an action brought by the attaching creditor, based on such agreement, that at the time of the levy of the attachment the firm was insolvent, that no part of the proceeds was applicable on the judgment obtained in the

action in which the attachment issued, the complaint was properly dismissed. *Id.*

#### ATTORNEY AND CLIENT.

1. The principle that now controls the recovery by an attorney for his professional services in an action against his client, in the absence of an express agreement, is that he is simply entitled to what they are reasonably worth. *Van Every v. Adams*, 126.
2. The determination or findings of a referee as to the value of such services, where there is conflicting testimony as to such value, must be affirmed. *Id.*

See LIEN, 1-3.

#### AUTHORITY.

Effect of decision of court of appeals, as authority. See *Prod. Bk. v. Morton*, 472.

#### BAILMENT.

In the case at bar, which was against a warehouseman for loss of goods, it was contended that sufficient arrangements were not made to prevent persons entering upon the premises at the front door, without observation, and also that a rear door was left in such a state, that strangers might have entered upon the premises without being noticed. The judge before whom the case was tried directed a verdict for the defendants. Upon the theory that the theft was committed by a person entering the premises burglariously after they were closed for the night, the direction was proper. But upon the theory that the goods were stolen by a person concealed upon the premises at the time they were

closed, several questions as to the care and diligence of defendants in guarding the premises during the day, arise. To justify the direction of the judge, it should have appeared conclusively that the means used by defendants to prevent a thief from entering upon the premises in the daytime, and concealing himself there, and being locked in at closing time, were such means as were used for the purpose by owners of like property in like circumstances. In the case at bar such was not the case, and the jury alone could determine by a verdict the conclusions of fact in the premises, and the facts should have been submitted to them. *Madan v. Cocert*, 135.

See CARRIERS.

#### BANKS AND BANKING.

1. The fact of payment by a bank of the amount of a check drawn by the depositor to the order of a payee, to a person other than such payee, on the forged indorsement on the check of the name of such payee, does not constitute a defense. It is not a payment to the written order of the depositor. This, unmixed with the element of inducement by or through the depositor to pay on the forgery, constitutes no defense to an action brought by depositor for recovery of money deposited. *Welsh v. Germ. Am. Bk.*, 462.
2. That a depositor signed checks for amounts not due to the payee, trusting, without making a personal examination, to his clerk's statement that such amounts were due, and after signing, handed them to the clerk, will not constitute negligence in above case. *Ib.*
3. Non-discovery of the forgery of the indorsements upon checks

drawn by a depositor to order of a payee, which checks had been honored by the depository and returned to the depositor with his pass-books, where he was charged with the amounts thereof, for a length of time after such return, say two years, and the not making any claim against the depository until after such discovery, is not a ratification of the payments made on such forged indorsements. *Ib.*

#### BILL OF LADING.

Persons receiving bills of lading, &c., conclusively presumed to know that they contain terms on which property is to be carried. See *Madan v. Sherrard*, 853.

See SALE, 1.

#### BILL OF PARTICULARS.

1. Bill of particulars is demandable as a matter of right only when the action is on an account stated, not when it is based on the original indebtedness. *Held* in this case not to be demandable. *Moore v. Belloni*, 184.
2. An order to that effect should be obtained at special term in advance of the trial, when it is desired to preclude the giving of evidence for failure to furnish bill of particulars when demanded. If the motion to produce is made in the first instance at the trial, it is then at best addressed to the discretion of the trial judge, the exercise of which should not be interfered with on appeal. *Ib.*

#### BILLS, NOTES AND CHECKS.

1. Where the maker drew his check for the purpose of making a gold loan, and without re-

ceiving at the time any consideration therefor, but relying on the promise of a third person to return its equivalent in currency, at the market rate of gold, on that day, by means of a currency check of the payee, and afterwards to adjust any fluctuation in the market value of gold occurring pending the loan in the mode usual in the case of loans of gold, delivered it to such third person for the purpose of being used by him to settle a rate of gold between him and the payee on a sale of coffee—(Such settlement is termed a conversion of the price of goods sold on credit from a gold to a currency price. One of the modes of effecting a conversion, and the one adopted in this case, is: A gold account is opened, then a note is taken for the approximate amount of the sale in currency. When the conversion is made the purchaser sends gold for the amount of the invoice, and receives from the seller an equivalent amount in currency at a fixed premium mutually agreed on, being ordinarily the ruling rate of gold at the time the conversion is effected; the gold account is then balanced by cash; a currency account is then opened wherein the purchaser is debited with the currency received by him for the gold, and credited with the approximate notes; upon payment of the notes and whatever balance there may be on the currency account in favor of the seller, that account is balanced and the merchandise paid for). Such third person used the defendant's check for settling the rate of gold between him and the payee, and received the payee's two currency checks, drawn to his order, for an equivalent amount in currency, at the premium which was the ruling rate of gold at that time. One of these currency checks he

indorsed and delivered to the drawer of the gold check, the other one he did not. The drawer of the gold check received and deposited the currency check delivered to him, and stopped payment of his gold check. The payee of the gold check had no notice or knowledge of the arrangement made between its drawer and the third person as to the manner in which it was to be paid for. *Held*, the payee of the gold check was a *bona fide* holder for value without notice and entitled to recover from the drawer. *Lully v. Colgate*, 544.

2. In the above put case the fact that the check was drawn to the payee's order when he had no dealings with the drawer, was not such notice to him that the gold check had not been paid for as to put him upon inquiry and make the check valueless to him until he had sent his currency check to the drawer of the gold check. *Id.*
3. Payment by a bank of the amount of a check drawn by a depositor to the order of a payee, to a person other than such payee, on the forged indorsement on the check of the name of such payee, does not constitute a defense to an action to recover money deposited. *Welsh v. Germ. Am. Bk.*, 462.

## BOND.

In case of a simple indemnity bond there is no breach until actual damage is sustained by the obligee, who must prove the same against the obligor or his indemnitor to sustain his action. There is a distinction between such a bond, and those like the bond in the present case, where the obligation is to perform a certain act, or to pay specific debts, and to hold harmless the obligee therefrom. In the latter

case, the breach is made and the contract broken, when the obligor fails to perform the act, or to pay the debts he covenanted to pay; and upon such failure and default, the obligee may recover the entire debt, although he had not been compelled to pay anything at the time the action was brought by him against the obligor. *Kohler v. Matlage*, 247.

### BROKERS.

1. Authority of a broker to bind his principal by a written contract, is implied from his employment to sell or buy, only where he effects a sale or purchase pursuant to the oral instructions of his principal. It results, that he cannot, by writing, bind his principal to any contract other than such as he was employed to make, that if he simply brings the parties together, and they make the agreement themselves, he has no implied authority to make a written contract, binding on them or either of them, although he was present and took part in the bargaining. *Lawrence v. Gallagher*, 309.
2. In above case, if he, having brought the parties together, they having themselves made the agreement, proceeds to reduce the agreement to writing, with their knowledge and assent, an authority so to do would be implied. The mere act of writing in the presence of the parties would not show knowledge on their part; but is one fact to be considered in connection with others. In determining what authority was thus conferred, the facts which would justify the jury in thinking that a bought note, made by the broker, was so made with the knowledge and assent of the purchaser, should be considered in determining whether it was

not a part of the understanding of the parties under which the bought note was made, that the broker should also make a sold note which should bind the seller. If it was the understanding that such sold note was also to be made, then, unless it was so made, there is no consideration for a bought note made by the broker. *Ib.*

### BURDEN OF PROOF.

See STATUTE OF FRAUDS, 8.

### BY-LAWS.

Restrictions by by-laws on sale or assignment of shares or right of membership in body corporate, does not destroy the character or incident as property, which such shares or right of membership otherwise had. *Ritterband v. Baggett*, 556.

See CORPORATIONS, 6.

### CARRIERS.

1. A concealment by the shipper of the true value of the goods shipped, or his silence alone, discharges the carrier from liability for ordinary negligence. *Magnin v. Dinmore*, 16.
2. The court of appeals have declined to hold that such an exoneration would reach the carrier, where his acts, or those of his servants and agents, in relation to the goods, amounted to misfeasance or abandonment of his character as carrier. *Ib.*
3. The rights of the passenger rest upon the contract that was made when he purchased his ticket. The benefits he gained as to times and trains, and the journey, were then settled and fixed, and the limitations of his rights were then settled and fixed. If the whole of plaintiff's rights were set forth by the ticket he purchased (see opinion), he had a



right to nothing but a continuous trip from New York to Rochester, and the ticket was not evidence of his right to take up another trip without paying fare, after he had stopped at an intermediate station. But in this case the defendants had rules and regulations that governed or limited this ticket, and its use by the passenger, that were more favorable to the passenger than the contract as expressed by the ticket itself. The passenger did not ask that these rules should be expressed on the ticket, and he did not even inquire about them. In the case at bar these rules were reasonable, and did not take from passengers any right they would have at common law under the contract as made. It is not a case where the rules seek to limit any common-law liability of the carrier, for breach of duty, &c. They enlarged and increased the rights and privileges of the passenger, beyond these embraced by the contract itself, and therefore no special or personal notice of the same to the passenger was necessary. Ignorance of such rules and of the restrictions consequent thereof, in such a case, does not alter the contract, nor prevent the rules and the restrictions being a part thereof. They enlarged the passenger's rights and privileges of transportation, subject to certain restrictions and forms, which were reasonable, and if the one was accepted, the other was coupled and united therewith. In the present instance, although the ticket gave no privileges beyond a continuous trip, yet the rules gave the passenger all he required as to stopping on the way. He was conscious that he did not know the rules exactly, but he did not seek for any information in regard to it, and because he was ignorant of the

reasonable form in which the defendant granted the privilege, he claimed the right to exercise that privilege in a form and manner devised by himself. There was error in the charge of the judge before whom the case was tried, to the effect that the plaintiff could recover unless it was proved that he had notice of these rules and regulations that affected the ticket. *Dunphy v. Erie Ry. Co.* 128.

4. Railroad corporations as carriers of passengers for hire, are bound to use all such reasonable precautions against injury, as human sagacity and foresight can suggest. *Weston v. N. Y. Elevated R. R. Co.*, 156.
5. Passengers have a right to assume that if they proceed with ordinary care over platforms and through passages leading to and from their seats in the train, that they may do so without risk of injury to life or limb from an unsubstantial, insecure or treacherous foothold. As in the case at bar the company is bound to be on the alert during cold weather to see whether there is ice upon the platform, and to remove it or make it safe by sanding it, or putting ashes upon it, or in some other manner. The degree of care requisite for safety varies with the exigencies of the case, and it is no error to assert that a more watchful scrutiny and care should be exacted and bestowed in winter than in summer in the protection of steps, landings and platforms from dangerous accumulations of ice and snow. *Ib.*
6. The test of instruments limiting the liability of common carriers by clauses of agreement inserted in the instrument delivered by them on the receipt of goods for carriage, is the character in which it is received. If received and taken by the party delivering the goods for carriage as a contract between him and the

carrier, the clauses of limitation will be binding; otherwise not. *Madan v. Stierard*, 353.

7. Persons receiving bills of lading and other commercial instruments are conclusively presumed to know that they contain the terms on which the property is to be carried, and to have assented thereto; but where the business of the carrier is the carriage of the luggage of travellers from railroads, steamboats, &c., to their residences, or to other railroads, steamboats, &c., and he employs agents to go on trains of cars, and steamboats, &c., and solicit from the passengers such carriage, and such agent, on receiving the luggage, or the railroad or steamboat check therefor, gives to the passenger a printed slip, after having written thereon a description of the luggage by the number of the check received, or otherwise, there is no such conclusive presumption; and the question as to the character in which the paper was received is to be determined by the surrounding circumstances. The placing of the words "Domestic bill of lading" on the paper does not alter the rule. *Id.*

See NEGLIGENCE, 4.

#### CASES CRITICISED, FOLLOWED, ETC.

- Moss v. Averill*, 10 N. Y. 459. Followed. *Brown Bros. v. Torrey*, 1.  
*Morris v. Sliter*, 1 Denio, 59. Followed. *Kohner v. Higgins*, 4.  
*Williams v. Healy*, 3 Denio, 363. Followed. *Kohner v. Higgins*, 4.  
*Hurburt v. Post*, 1 Bosw. 28. Followed. *Knox v. Hexter*, 8.  
*Kelsey v. Ward*, 38 N. Y. 88. Followed. *Knox v. Hexter*, 8.  
*Boyd v. Colt*, 20 How. Pr. 384. Followed. *Lynch v. Pyne*, 11.  
*Finch v. Parker*, 49 N. Y. 1. Followed. *Lynch v. Pyne*, 11.  
*Magnin v. Dinsmore*, 62 N. Y. 35.

Followed. *Magnin v. Dinsmore*, 16.

- Thayer v. Lewis*, 4 Den. 271. Cited and approved. *People v. Bull*, 19.  
*Cox v. N. Y. C. & H. R. R. Co.*, 61 Barb. 615. Cited and approved. *People v. Bull*, 19.  
*Avery v. Foley*, 4 Hun, 415. Followed. *Wilson v. Knapp*, 25.  
*Wilcox v. Howell*, 44 N. Y. 402. Followed. *Weil v. Fischer*, 32.  
*Eitel v. Bracken*, 38 Sup'r Ct. 7. Followed. *Weil v. Fischer*, 32.  
*Justice v. Lang*, 42 N. Y. 493; 52 Id. 823. Followed. *Mason v. Decker*, 115.  
*Clark v. Crandall*, 27 Barb. 73. Followed. *Mills v. Gould*, 119.  
*Moses v. Bierling*, 81 N. Y. 462. Followed. *Mills v. Gould*, 119.  
*Nelson v. Plimpton F. E. Co.*, 55 N. Y. 484. Followed. *Mills v. Gould*, 119.  
*Pollen v. Leroy*, 30 N. Y. 558. Approved. *Mills v. Gould*, 119.  
*Dustun v. McAndrew*, 44 N. Y. 78. Approved. *Mills v. Gould*, 119.  
*Lewis v. Greiden*, 49 Barb. 635. Approved. *Mills v. Gould*, 119.  
*Stow v. Hamlin*, 11 How. Pr. 452. Followed. *Van Every v. Adams*, 126.  
*Garfield v. Kirk*, 65 Barb. 464. Followed. *Van Every v. Adams*, 126.  
*Coleman v. Livingston*, 56 N. Y. 658. Followed. *Madan v. Covert*, 135.  
*Tilson v. Terwilliger*, 56 N. Y. 273. Reviewed and followed. *Einstein v. Chapman*, 144.  
*Campbell v. Foster*, 85 N. Y. 861. Followed. *Parker v. Harrison*, 150.  
*Hurlbut v. N. Y. C. & H. R. R. Co.*, 40 N. Y. 145. Followed. *Weston v. N. Y. El. R. R. Co.*, 156.  
*McDonald v. C. & N. W. R. R. Co.*, 56 Iowa, 124. Followed. *Weston v. N. Y. El. R. R. Co.*, 156.  
*Kemple v. Darrow*, 89 Sup'r Ct. 447. Distinguished. *Dillon v. Masterton*, 177.

- Butterfield v. Radda*, 40 N. Y. Sup'r Ct. 169, 172. Followed. *Produce Bank v. Morton*, 124.
- Sweet v. Bartlett*, 4 Sandf. 661. Distinguished. *Crotty v. McKenzie*, 193.
- Rowe v. Stevens*, 34 Sup'r Ct. 436. Followed. *Ibbotson v. King*, 207.
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- Ingersoll v. N. Y. & C. R. R. Co.*, 6 T. & C. 416. Approved. *Leonard v. N. Y. & C. R. R. Co.*, 225.
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- Schatter v. Gardiner*, 47 N. Y. 402. Followed. *Leonard v. N. Y. & C. R. R. Co.*, 225.
- Borat v. L. S. & M. R. R. Co.*, 4 Hun, 349. Followed. *Leonard v. N. Y. & C. R. R. Co.*, 225.
- Thurber v. Harlem, & C. R. R. Co.*, 60 N. Y. 331. Followed. *Leonard v. N. Y. & C. R. R. Co.*, 225.
- Sutherland v. N. Y. & C. R. R. Co.*, 41 Sup'r Ct. 17. Distinguished. *Leonard v. N. Y. & C. R. R. Co.*, 225.
- Mich. E. R. R. Co. v. Kunonn*, 39 Ill. 272. Followed. *Leonard v. N. Y. & C. R. R. Co.*, 225.
- Olement v. Canfield*, 28 Vermt. 302. Followed. *Leonard v. N. Y. & C. R. R. Co.*, 225.
- Wyman v. P. & K. R. Co.*, 46 Maine, 162. Followed. *Leonard v. N. Y. & C. R. R. Co.*, 225.
- Webb v. P. & K. R. Co.*, 57 Maine, 117. Approved. *Leonard v. N. Y. & C. R. R. Co.*, 225.
- Dubois v. Phillips*, 5 John. 235. Cited and approved. *Tyng v. Marsh, et al.*, 235.
- Leggett v. Hunter*, 19 N. Y. 459. Followed. *Keiley v. Dusenbury*, 238.
- Cruger v. Halliday*, 11 Paige, 819. Followed. *Keiley v. Dusenbury*, 238.
- Thatcher v. Canda*, 3 Keyes, 157. Followed. *Keiley v. Dusenbury*, 238.
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- Smith v. Brady*, 17 N. Y. 176. Followed. *Haden v. Coleman*, 256.
- Glamais v. Black*, 50 N. Y. 148. Followed. *Haden v. Coleman*, 256.
- Barton v. Hermann*, 11 Abb. Pr. N. S. 378. Followed. *Haden v. Coleman*, 256.
- Irving v. Excel. F. Ins. Co.*, 1 Bos. 507. Overruled. *Neill v. Am. Pop. L. Ins. Co.*, 259.
- McMasters v. Ins. Co. N. Am.*, 55 N. Y. 222. Followed. *Neill v. Am. Pop. L. Ins. Co.*, 259.
- Parmlee v. Hoffman Ins. Co.*, 54 N. Y. 193. Followed. *Neill v. Am. Pop. L. Ins. Co.*, 259.
- Kirkland v. Dinsmore*, 62 N. Y. 179. Reviewed and followed. *Madan v. Sherrard*, 353.
- Foot v. Aetna L. Ins. Co.*, 61 N. Y. 577. Followed. *Ritzler v. World L. Ins. Co.*, 409.
- Simmons v. Sissons*, 26 N. Y. 276. Reviewed and distinguished. *Ross v. Harden*, 427.
- Loddell v. Ib.*, 36 N. Y. 333. Reviewed and distinguished. *Ross v. Harden*, 427.
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- Brague v. Lord*, 41 Sup'r Ct. 193. Reviewed and followed. *Ross v. Harden*, 427.
- Bogert v. Morse*, 1 N. Y. 377. Followed. *Black v. White*, 446.
- Produce Bk. v. Morton*, 40 Sup'r Ct. 328. Overruled. *Ib.* 472.

CODE OF CIVIL PROCEDURE.  
(NEW CODE.)

§§ 968, 969, 970, 1009, 1013. See *Batzel v. Batzel*, 561.

## CODE OF PROCEDURE.

(OLD CODE.)

- § 264. See *Ibbotson v. King*, 207.
- § 470. See *Tyng v. Marsh*, 285.
- § 222. See *Palmer v. Foley*, 365.
- § 366. See *Brennan v. Arnstein*, 875.
- § 399. See *Ross v. Harden*, 427.
- § 268. See *Prod. Bk. v. Morton*, 472.
- § 298. See *Ritterband v. Baggett*, 556.
- § 253. See *Batzel v. Batzel*, 561.
- § 266. See *Ib.*
- § 270. See *Ib.*
- § 271. See *Ib.*

## COLLECTOR OF ASSESSMENTS.

See NEW YORK CITY.

## COMPENSATION.

Principles governing compensation of attorneys. See *Van Every v. Adams*, 126.

## CONDITION.

See CONTRACTS, 7.

## CONSIDERATION.

See CONTRACTS, 3, 4.

## CONSPIRACY.

See EVIDENCE, 8-10.

## CONSTITUTION.

Const. N. Y. 1846, art. 1, § 2. See *Batzel v. Batzel*, 561.

## CONSTRUCTION.

Words in a deed "party of the first part," construed to mean "party of the second part." See *Fairchild v. Lynch*, 265.

## CONTRACTS.

1. In a contract between parties for the exchange of real estate, where each party covenants to take property subject to a mort-

gage of a specified amount, "and to give a good warranty deed with full covenants, and free from all incumbrances except the mortgage specified," a tender of a deed by one party that contained after the habendum clause the following words, "subject, however, to a mortgage (describing the same fully) which said mortgage, with the interest, &c., the party of the second part hereby and by the acceptance of these presents assumes and agrees to pay," is not a fulfillment of the contract. It is clearly a departure from the provisions of the contract, for it places the party to whom it was tendered in a different position in respect to the payment of the mortgage than if the deed had simply conveyed the property subject to it, and the party offering such deed was left in the position of having made no tender. *Kohner v. Higgins*, 4.

2. If a party from bad faith or any other motive or cause, tenders a deed that openly or covertly varies in its terms from that called for by the preliminary contract, the fact that the vendee may not discover it or may not specifically point out the objection, when so tendered, does not place the party in any better position than if the objection had been made. *Ib.*
3. In a contract of the character above referred to, the covenants are mutual. The act to be done by one, is the consideration for the act to be done by the other; and consequently neither can maintain an action for non-performance against the other, until he has performed or offered to perform his part of the contract. *Ib.*
4. An agreement in writing, whereby a party who executes the same promises to buy certain property of a party named in the agreement (but who does not execute the same), is valid if

supported by a sufficient consideration, and such consideration may be proved by parol, and may consist of the promise or engagement to sell the property described in the agreement, on the part of the other party named therein, but who did not execute the same. *Mason v. Decker*, 115.

5. The complaint claimed damages for the non-fulfillment of a contract for the sale and purchase of gold. It alleged that the sale and purchase was made under and in accordance with the rules of the gold exchange, and that said rules formed part of the agreement, and that one of them, controlling the contract, provided, that on all contracts made at the board, either party might require a deposit of twenty per cent. as security, &c. That after notice, &c., under this rule, the defendant refused to make this deposit, and plaintiff afterwards sold the gold at a lower rate than the price named in the contract, &c. *Held*, that although the rule of the gold exchange is expressly confined to the contracts made at its board, if parties choose to agree that their contracts shall be governed by, and be subject to, the rules of the gold exchange, they can do so, and such rules may be resorted to, in ascertaining the character, and the fulfillment or breach of such contracts, so far as those rules control or relate to the same, and the allegations of the complaint are sufficient to bring the contract under the control and interpretation of the rule set out therein. The effect of this rule is that a failure to deposit as therein provided, constitutes a breach of the contract that is made subject to it; and not only that, but it also gives the aggrieved party an immediate right of action for his damages; proof of tender or readiness to perform becomes unnecessary.

The defendant, by his refusal, caused a failure to complete the contract, and cannot now avail himself of the non-performance that he has occasioned. The plaintiff in this case was not the pledgee of the gold. On the failure of the defendant to complete the contract, he could resume his original rights in respect to the gold, and could sell if unrestricted by any obligation to give notice to the defendant. *Mills v. Gould*, 119.

6. Permitting the continuance of work under a contract after the time limited therein, is waiver of the provision as to time of performance. In such case the contract continues open for performance until another limit is fixed, either by the service of a notice requiring performance by a reasonable time therein specified, and notifying the party on whom it is served, that in case of default in so performing his rights would be deemed abandoned, or in some other manner. In case of default in complying with such notice, the party giving it may rescind the contract and retain the benefits of a partial performance, but in such case he would waive his claim for damages. Notice, in such case as above, to the effect that the party serving it would take the further execution of the contract into his own hands, and complete the same for account of the party on whom it is served and hold him responsible in damages, is not sufficient to limit time for performance. Such notice is an act of the party giving it, which prevents full performance by the other. Consequently the party on whom it is served is entitled to recover the value of what he had done under the contract. The party giving it is entitled, there being no unperformed condition on his part, to recover the damages sustained by him in consequence

- of the delay in performance. *Dillon v. Masterton*, 176.
7. A party who enters into a contract to perform certain work, payment for which is to be made according to the provisions of the contract, one of which is the production by him of the architect's certificate of the completion of the work, must produce that certificate as a condition precedent to payment, and is as much bound by that provision and condition in the contract as by any other. Payments made by the defendant on the contract without any demand or requirement of the production of such a certificate, do not operate as a waiver of the certificate as to the other payments, or of the final certificate upon the completion of the work. The statements of the defendant, that he was pleased with the work, or that he was dissatisfied with the architect, or a negotiation for the release of the payment of a loan to the defendant by the builder, as a condition for the payment of the balance claimed by the builder, on the contract in question, do not create a waiver of this condition precedent on the part of the builder. *Haden v. Coleman*, 256.
  8. If a contract call for the obtaining the consent or sanction of or ratification by a government of a certain organization obtaining an order or decree, from which by a constructive implication, the desired consent, sanction, or ratification may be inferred, is not sufficient. The consent, sanction, or ratification must be express, not implied only. *O'Sullivan v. Roberts*, 282.
  9. A power of attorney containing recitals as to the objects for which it is made, and authorizing the performance of certain things, does not necessarily constitute a contract for compensation upon the performance of the authorized things. That must depend on the agreement under which the power was given. If that makes compensation depend on the doing of things in addition to those contained in the power, the attorney must do the additional things to entitle him to compensation. A letter written by the attorney stating what in his view was the agreement, and referring to the power as setting forth the agreement so stated, is sufficient to entitle the defendant to go to the jury on the question, among others, whether the agreement was not as stated in such letter. *Ib.*
  10. An expression in a contract of sale and purchase of articles (otherwise clearly expressed), that the same is made "on the usual terms" or "by the usual contract" is indefinite and uncertain. It may refer to the terms on which payment and delivery are to be made; or, that the interests of the various co-owners of the property should be settled as they were usually in the trade. Before a jury can find as against a defendant that the expression was used in the latter sense it must be established: that there was a practice in the trade respecting the settlement of the interest of the various co-owners of the article which is the subject of the contract, this practice need not amount to a legal custom or usage; that the defendant knew what the practice was; that the defendant meant to refer to the practice by the general words used. *Lawrence v. Gallagher*, 309.
  11. In the case of a prospectus calling for applications, and applications made pursuant thereto, when the prospectus and the blank form of application accompanying it contain no promise to grant that which should



- be applied for ; *a fortiori*, where the nature of the prospectus and blank application is such as to inform the party applicant that the party issuing the prospectus reserves the right to exercise his discretion and judgment as to whether the application should be granted or not, the prospectus and the application do not make a contract. This although the party applicant may have gone to expense in and about the carrying into effect his application. *Demuth v. Am. Institute*, 336.
12. Where J. contracted with S. to insert a certain advertisement in 30 different newspapers for a period of one year, in consideration of a certain sum to be paid quarterly in advance, and during the quarter for which suit was brought the advertisement was omitted in seven consecutive issues of one of the papers. *Held*, not a substantial compliance. An inference springs from this that J. was either negligent or intentionally in fault. *Ibbotson v. Sherman*, 477.
13. In above case where a witness swore to the non-insertion in seven consecutive issues of one of the papers and produced the issues of the papers, and J. as a witness swore that he put the advertisement in 34 papers and that it was in all of them for 6 months to his own knowledge ; but also swore that he himself had received the issues of but 20 papers, and gave an unsatisfactory account as to the other 10 ; and the referee decided as matter of fact there was a substantial performance. *Held*, the evidence did not establish substantial performance, and the judgment should be reversed. *Id.*
14. The notes in question being dated and payable at the city of New York, and having been delivered to the payee in the State of New York, by being mailed

by the maker at the city of New York to the payee by his direction ; *Held*, the contract was not only made, but to be performed in the State of New York, and the usury law of that State governs. *Heidenheimer v. Mayer*, 506.

15. The sense which words used in a contract have acquired in the trade with regard to which they are used, may be shown by usage. It is not necessary that the word or phrase should be at all ambiguous on its face, or relate to an art or science. The term cargo may be shown by the usage of the fruit trade to exclude the deck-load, when it is used in reference to that trade. *Eneas v. Hoops*, 517.
16. Custom cannot be invoked to change the established rules of law, or to change or modify the express terms of the contract. *Farmers' Bk. v. Brown*, 522.

See BROKERS; CARRIERS, 3; DAMAGES, 1; DEED; EVIDENCE, 12-19; GUARANTY.

## CONVERSION.

See TRUSTS, 1-3.

## CORPORATIONS.

1. A stockholder claimed to be liable for debts, &c., who has himself signed the note, which is the subject of the action, as an officer of the company, is estopped from setting up a want of power in the officers to make the note. *Brown & Bros. v. Torrey*, 1.
2. The act of 1853,—providing for the purchase of property by the issue of stock for the same,—does not change the effect of the law of 1848, as regards the filing of the certificate of the payment of the whole of the capital stock. The same requisites are necessary as to verification and public notice of the fact of the issue of

paid up stock for property, in order to relieve the stockholder from liability. *Ib.*

3. The creditors' rights are not affected by a contract between the company and its president, of which they had no notice or knowledge. *Ib.*

4. In the case at bar the issue was whether the clerks of the defendant had authority to purchase the goods in question on credit. Plaintiff proved that after a dispute on this question had arisen, the secretary of the company referred him to the president, who, after examination, promised to pay the demand. *Held*, evidence as against the corporation that the clerks were authorized to buy on credit; that the president had power to ratify the acts of the clerks, though originally unauthorized; and that said promise operated as a ratification. *Held further*, that the promise was sufficient to sustain the denial of a motion to dismiss the complaint, and a verdict in favor of plaintiff. *Silva v. Metropolitan Drug Co.*, 307.

5. Under section 5 of the act of New Jersey entitled "an act concerning corporations," approved February 14, 1846, the liability of stockholders can only be enforced by an equitable action brought by or on behalf of all the creditors against the corporation, making all the delinquent debtors also defendants, to assess upon and recover from each their pro rata shares of the debts. *Griffith v. Mangam*, 369.

6. Membership in cotton exchange constitutes property, which is subject to be applied to the payment of the debts of the member. Notwithstanding a by-law whereby an assignment can be made only to a member, or a member elect, the membership constitutes property; such by-law merely affects the use of the

property. *Ritterband v. Baggett*, 556.

See BY-LAWS; MUNICIPAL CORPORATIONS; STOCKHOLDERS.

### COSTS.

In case of order of general term reversing the judgment and ordering a new trial, with costs to the appellant to abide the event, respondent, on again succeeding upon the new trial, cannot include in his bill of costs as a taxable item, the amount adjudged to him for costs by the judgment reversed. This, although the reversal was for a technical error. *Cochran v. Gottwald*, 214.

See LIEN.

### COUNTER-CLAIM.

Under act of 1875, chap. 49, no claim not affecting the people can be counter-claimed. Consequently a claim against the city cannot be. Nor can any matter be considered as a set-off against the recovery of money for the recovery whereof the act gives a right of action to the people. *People v. Starkweather*, 325.

### COURT OF APPEALS.

A decision of the court of appeals pronounced in the very case in hand, through the opinion of one of its distinguished judges, after careful consideration and cogent reasoning, although in strictness not binding authority, is entitled to very great weight. *Produce Bk. v. Morton*, 472.

### COURTS.

See COURT OF APPEALS;  
JURISDICTION.

### CREDITOR'S BILL.

1. In case of property held in trust for the defendant, where such trust has been created



by, or the fund so held in trust has proceeded from, some person other than the defendant himself, it cannot be reached and applied in payment of the judgment by creditor's bill. *Parker v. Harrison*, 150.

2. The legislature has defined the cases and prescribed the manner in which, after the return of an execution unsatisfied against the property of a judgment creditor, satisfaction may be decreed out of property or things in action belonging to or held in trust for him, and all the power of the courts in the premises is derived from and is limited by legislation. *Ib.*

3. The article of the Revised Statutes, relative to the general powers, duties, and jurisdiction of the court of chancery (2 R. S. 273), prescribe the limitations within which the satisfaction of judgments out of property held in trust for a judgment debtor, can be decreed in a creditor's suit; and sections 38 and 39 (2 R. S. 274) were construed as excepting property held in trust for the debtor, where the trust has been created by, and the fund so held in trust has proceeded from some person other than the debtor himself. *Ib.*

4. While the income derived from the money held in trust remains in the possession of the trustee, it is applicable, solely and exclusively, to the purposes of the trust, and it cannot be treated otherwise by the trustee, the *cestui que trust*, or his creditor. *Ib.*

5. The relation of trustee and *cestui que trust*, must be terminated by the fulfillment thereof, and the money ceased to be held in trust and become absolutely and unqualifiedly the property of the judgment debtor by delivery to him, and the trustee discharged from all responsibility in regard to the same before it shall be liable for the debts of the *cestui*

*que trust*, the judgment debtor. *Ib.*

### CUSTOM.

See CONTRACTS, 10, 15, 16;  
EVIDENCE, 15.

### DAMAGES.

1. When one, on making a contract with another, knows that that other party has an existing contract with a third party for the same work, and that such other party is making with him a sub-contract to the principal one, and he, by his sub-contract, agrees to supply the work necessary to fill the principal contract, any damage to the principal contractor, which would naturally flow from a breach by him of his principal contract in consequence of the default of the sub-contractor, may be recovered of, or recouped against the sub-contractor. *Dillon v. Masterton*, 176.

2. In above case, the damages, if such there are, arising from the refusal of the third party to give other contracts to the principal contractor, by reason of his being in default in his existing contract, which default was caused by the default of the sub-contractor, do not so naturally flow from such breach. *Ib.*

See CONTRACTS, 6.

### DEED.

1. A deed contained the following clause "subject, nevertheless, to a certain mortgage . . . which the party hereto of the first part assumes and agrees to pay as part of the consideration hereinbefore expressed." The word "first" was construed to read and mean "second," and as thus construed, constituted an agreement by the grantee to pay the mortgage. *Fairchild v. Lynch*, 265.

2. If one, constituted by another his agent for the reception of a deed, accept one which, upon a proper construction, contains a clause whereby the property was conveyed. "subject to a mortgage which the party of the second part assumed and agreed to pay," his principal will be bound to perform such agreement, and to save the grantor harmless from any liability on the mortgage. *Fairchild v. Lynch*, 265.

See CONTRACTS, 1.

#### DEFENSES.

Payment of check by bank on forged indorsement, not a defense to action for money deposited. See *Welsh v. Germ. Am. Bk.*, 462.

See BANKS and BANKING, 1-3;  
COUNTERCLAIM.

#### DEFINITIONS.

"Officer." See *Olmstead v. Mayor, &c.*, 481.

"Employee." See *Ib.*

"Cargo." See *Eneas v. Hoops*, 517.

"Deck-load." See *Ib.*

"Gold loans." See *Lally v. Colgate*, 544.

"Gold sales on credit." See *Ib.*

"Hinder and Delay," as used in statute as to fraudulent conveyances. See *Burnham v. Brennan*, 49.

"Found," as used in statute relating to substituted service. See *Carter v. Youngs*, 169.

#### DELIVERY.

See FRAUDULENT CONVEYANCES;  
STATUTE OF FRAUDS.

#### DEMAND.

See GUARANTY, 2

#### DEMURRER.

See TRIAL, 2.

#### DISCRETION.

See BILL OF PARTICULARS, 2;  
REFERENCE, 4-6.

#### DIVORCE.

In an action for divorce *a vinculo*, each party has both a constitutional and statutory right to trial by jury. Reference or trial by the court can not be compelled. The right to a trial by jury may be waived in the manner prescribed by section 1009 of the Code of Civil Procedure. Sections 253, 266, 270, 271 of the Code of Procedure, rule 40 (formerly 33) of the rules in force prior to January 1, 1878; sections 968, 969, 970, 1013, of the Code of Civil Procedure; chap. 15, of the report of the commissioners to revise the statutes to the legislature of 1877; 2 *Edm. N. Y. Statutes*, 150; 1 *Rev. Stat.* 145, § 40; 1 *R. L.* 197; art. 1, § 2, constitution of 1846, and ¶ 1, of § 6, of the so-called temporary act of June 2, 1877, referred to, commented on, and compared, with the above result. *Batzel v. Batzel*, 561.

#### EQUITY.

See ACCOUNT STATED; CREDITOR'S  
BILL.

#### ESTOPPEL.

1. Where a mortgage has been executed and placed upon the market for sale, and both the mortgagors and mortgagee assured the person who proposed to purchase, and who afterwards became the purchaser and assignee of the same, when they were inquired of in relation to the mortgage, that the consideration was for money advanced by the mortgagee for building the house on the premises, and the mortgagors assured him it was made for value, and gave

- him a certificate, stating among other things, "that they knew of no offset or defense, legal or equitable, to said bond and mortgage," and the said assignee relied upon those statements and certificate, and purchased the bond and mortgage, the mortgagors cannot afterwards show that the bond and mortgage was without consideration, and void because of usury in its inception. *Weil v. Fischer*, 32.
2. It is the right of the assignee, plaintiff in such a case, to prove that he relied upon the facts stated in the said certificate, and acted upon such reliance, and bought the mortgage in good faith, in order to show that good faith and conscientious course and equity, upon which the doctrine of estoppel rests. *Ib.*
  3. The evidence shows that the mortgagors, although Germans, had as good or a better knowledge of the English language, than most Germans who have been for the same long period residents of this country. The one read the certificate to the other, in the presence of the plaintiff's attorney, and both said they understood it. They had the fullest opportunity to enlighten themselves as to its effect, and if they omitted so to do, under the circumstances shown, the law gives them no special immunity or privilege, to avoid an obligation thus incurred, or to accomplish a wrong, under the plea or claim of an imperfect acquaintance with the English language, and such a claim cannot be sustained. *Ib.*
  4. The principle of an estoppel is that the party claiming it must have done, or omitted to do something, in reliance on the act or statement of the party against whom the estoppel is claimed, and in consequence of such reliance would be injured if proof that the fact was otherwise was admitted. *Burnham v. Brennan, Sheriff, &c.*, 49.
  5. The fact that a defendant has expressed himself entirely satisfied with the result of plaintiff's labors does not constitute such acceptance as to prevent the defendant from showing that plaintiff had not fulfilled his contract, and obtaining a verdict upon such showing. It is, however, proper evidence to go to the jury on the question as to what the contract was and whether the plaintiff had performed his part. *O'Sullivan v. Roberts*, 282.
  6. Stockholder sued for debts, &c., who has signed note in suit as officer of the company, is estopped from setting up want of power in company to make note. See *Brown Bros. v. Torrey*, 1.
- See EVIDENCE, 2 ; EXECUTION, 1 ; INSURANCE, 2, 4, 8.

## EVIDENCE.

1. When the testimony of a party to the action at the trial is fully contradicted by his own letters, written at a time when the facts were fresher in his memory than at the time of the trial, his testimony is entitled to no consideration. *Lynch v. Pyne*, 11.
2. When one having a transaction with another refers that other to a third party for information or directions as to such transaction, the conversations with such third party upon the subject as to which information or directions were to be obtained from him are admissible against the one so referring, and he will be bound by them in the same manner and to the same extent as if they had been had personally with him. *Volkman v. Feldman*, 44.
3. Acts done by a party without the knowledge of another, and on which that other has not acted, when proved and relied

- on by that other as evidence against the one doing them, may be explained. Proof of attendant facts and circumstances and proof of mental operations concurrent with the acts is admissible in explanation. *Ib.*
4. When the issue is whether in the transaction in question the defendant was acting for himself or another, and there is conflict of evidence as to what took place between him and plaintiff at its beginning, evidence on behalf of defendant that he had no motive to employ the plaintiff on his own behalf is admissible. *Ib.*
  5. If a party who has it in his power to call a witness who is friendly to him, and is in a position to give material evidence, omits to do so, or if he destroys papers bearing on the issue, such omission or destruction must tell against the party so omitting or destroying, unless the omission or destruction is satisfactorily accounted for. *Burnham v. Brennan, Sheriff*, 49.
  6. Admissions by an owner of personal property made after he had parted with the title are admissible when there is prima facie evidence that the transfer from the party who made the admission, to the party against whom it is offered, was fraudulent as to the party who offers it. *Ib.*
  7. The testimony of a witness as to the market value of negotiable securities at a somewhat remote period, founded on a general recollection, based on his keeping the run of the market price in consequence of his being very much interested in the company which issues the securities, is competent and sufficient prima facie, although he has no recollection of buying or selling, or as to any sales or purchases made at that period. *Smith v. Frost*, 87.
  8. In a civil action for conspiracy to defraud, it is not always necessary to first give evidence sufficient to establish prima facie pre-concert of action. *National Trust Co. v. Roberts*, 100.
  9. When the action is to recover damages by reason of a loan having been obtained on forged paper, and the defendants are charged with conspiring to manufacture and utter the paper, and to obtain the loan thereon, evidence of what occurred between the person making the loan and the defendant applying for it, of the declarations of that defendant made in and about obtaining the loan, of the means employed by that defendant to inspire confidence, and of the fraudulent character of such means, is admissible without first introducing evidence as to pre-concert of action. This notwithstanding that such person, although named as a party defendant, has not been served with summons, and neither appears in, nor defends, the action. *Ib.*
  10. Where money alleged to have been obtained from the plaintiff through the conspiracy in relation whereof the action is brought, has been attached in the action, evidence of the financial condition of the conspirators while the scheme of the conspiracy was in progress, and when it was carried into effect, is admissible. *Ib.*
  11. Copies of written instruments are admissible in evidence, without accounting for the originals, when the party against whom they are offered, furnished them to the party on whose behalf they are offered, as a guide in the performance of the contract contained in the originals to be performed by the latter for the former. *Moore v. Belloni*, 184.
  12. In case of indefinite expressions in a writing, extrinsic proof is admissible to show what

- the parties intended to be covered by, and included in the expressions used. *E. g.*, A contract called for the obtaining the "sanction" of a government to a certain organization: extrinsic proof is admissible to determine "what sanction" was agreed to be procured. *O'Sullivan v. Roberts*, 282.
13. Recitals in a power of attorney operate as admissions as to facts, but may be explained or contradicted by proof of a contemporaneous contract, or of a contract for part execution whereof the power was given. *Ib.*
14. Acceptance of a bought note stating that the buyer is to buy, is not conclusive that the seller has promised to sell. It is only one fact to be considered. *Lawrence v. Gallagher*, 309.
15. Where the contract, by unambiguous terms, is in a certain event to clothe one of the parties thereto with the rights of an owner of certain property, the subject of the contract, a usage which would annul such right is inadmissible. *Ib.*
16. Evidence is admissible to show the sense in which indefinite expressions were used by the parties in a contract; and under a proper state of evidence it becomes a question of fact for the jury to determine in what sense they were used by the parties. *Ib.*
17. In case of a contract void by statute of frauds, a promise to pay made subsequent to the accruing of the alleged liability, will not make defendant liable, but when there is an issue as to the authority of a broker to make a binding written contract, to wit, a bought note on behalf of the promisor, and there is some evidence tending to show that the promisor knew that the broker had assumed to make such bought note on his behalf, and assented thereto, the promise is relevant testimony on the question of authority to make a bought note in conformity with the terms of the purchase. But, *semble*, not to include therein other terms. *Ib.*
18. Where a bill is presented to a party to a contract, showing a liability thereunder, which could only be arrived at by reading an indefinite expression in the contract in a particular sense, and he promises to pay, except as to a part, his non-liability for which he places on a ground growing out of and depending on that construction of the contract upon which the bill presented to him was made out, such promise is relevant evidence to the fact that the promisor, at the time of making the contract, knew what the expression referred to, and that it was used in the sense attached to it by the party making out the bill, and that he, the promisor, intended it to be used in that sense. *Ib.*
19. It not appearing that the assured had any knowledge or intimation of the cancellation of his policy of insurance, and the facts proved showing that there could be no valid cancellation; evidence as to the fact of cancellation and the practice of the company in relation thereto is inadmissible. *Butler v. Am. Pop. Life Ins. Co.* 342.
20. In the case at bar the court, against the objection and exception of the defendants, permitted the plaintiff to testify on his own behalf to a conversation and interview with the defendant's intestate in regard to the services that he was to perform, and which were the subject of this action. Upon the theory that the witness could leave out his own personal share of the conversation, and testify only to such part thereof, as was had between the deceased and another. *Held*, to be error, as

such testimony was within the rule excluding such transactions and communications (Code, § 399). *Ross v. Harden*, 427.

21. Proof of the delivery of money, its reception and use, is not proof of an obligation on the party receiving and using it to return the same, and consequently does not establish an implied promise. In proof of a count for money lent, &c., it is not sufficient to merely show that the plaintiff paid money to the defendant; such proof is *prima facie* evidence only of the payment by the plaintiff of his own debt, antecedently due to the defendant. The plaintiff must also prove that the transaction was essentially a loan of money to the defendant. A very slight circumstance may establish that it was a loan, or that it was paid at the request of the receiver, but there must be that circumstance to overthrow the legal presumption. In this case, to make an implied promise to pay, it should have appeared that the money was paid upon the request of defendant, either express or implied. It was error for the court to charge substantially that the law implies an obligation or promise to return the money from the fact of its receipt and use by the defendant, throwing aside all the testimony as to which there was a conflict. *Black v. White*, 446.

22. Evidence purely in support of a witness cannot be given until a necessity has been shown for it by impeachment. *E. g.*, where a witness has sworn to a fact on his examination, he cannot, before his recollection as to the fact has been attacked by the other, be asked by the party on whose examination he so swore as to the cause of his recollection or the means by which he refreshed it. *O'Hagan v. Dillon*, 456.

23. A question "Had you an op-

portunity of knowing, &c.," if not illegal, is immaterial where the witness had been examined as to all the facts that could be justly relied on to show opportunity of knowledge, or to show the fact as to knowledge of which the inquiry was made. *Ib.*

24. When a witness admits having had a conversation, but is not asked the details, another witness cannot be called to testify to the details, for the purpose of contradicting first witness. *Ib.*

25. A witness on cross-examination denied that in a conversation with one Smith, he had said he was a man of influence. *Held*, that this was collateral, and not a proper subject of contradiction. *Ib.*

26. The motives of a witness in testifying are relevant to the main issues. *Ib.*

27. Where a witness for defendant is asked on cross-examination as to whether he had not made to one B, certain statements which tended to show that he meant to conciliate the defendant, by appearing as a witness and by his testimony, and he denied making them, B may be called to prove that he did make them; because it is evidence as to the motive of the witness in testifying, and therefore not evidence on a collateral issue, but evidence relevant to the main issue. *Ib.*

28. An estimate made on a part of a whole does not necessarily furnish a basis for a calculation, as to whole, based on such estimate. Therefore, an offer to prove by a witness (an expert), that he had estimated the number of culls in a part of a cargo, and that he could estimate such percentage with accuracy, with the view of showing the percentage of culls in the whole cargo, was properly excluded. *Eneas v. Hoops*, 517.

29. Incompetent evidence, when



reception of is not ground for reversal. *O'Hagan v. Dillon*, 456.

See APPEAL, 1; CORPORATIONS, 4; ESTOPPEL, 5.

### EXCEPTIONS.

Exceptions ordered to be heard in first instance at general term, what can be considered on. See *Ross v. Hurdan*, 427.

See REFERENCE, 2.

### EXECUTION.

1. Where the sheriff makes a return of *nulla bona*, an action having been brought against him before such return to recover goods levied on, the return will not estop the sheriff from claiming that the goods were the property of the execution debtor, or that he had a leviable interest therein. *Burnham v. Brennan, Sheriff, &c.*, 49.
2. The court out of which the execution issued, has power to amend it *nunc pro tunc*, by striking out the return of *nulla bona*. *Ib.*
3. It is not necessary to give any notice of motion for leave to amend, to a party claiming goods under a levy made by the sheriff prior to such return. *Ib.*
4. Where two or more persons claim to be tenants in common of personal property by title derived from a common vendor, the sheriff, under an execution against the vendor, may, if the transfer to one of those claiming to be tenants in common is fraudulent and void, levy on and seize the whole property and the vendor's interest so fraudulently transferred. *Ib.*
5. Trespass or replevin against sheriff in such case could not be sustained by the other parties in interest. *A fortiori*, an action brought by them, and the fraudulent transferee cannot be sustained. *Ib.*

6. Execution cannot issue upon a judgment satisfied of record. The satisfaction must first be vacated on motion. *Crotty v. McKenzie*, 192.

7. The court has power to grant stay of execution to enable the judgment debtor in a cross action brought by him against the judgment creditor, to recover judgment so as to offset it against the judgment on which the execution is about to be issued, and will exercise the power where the party against whom the stay is asked is protected and secured, while the other is in peril and exposed to loss, and the subject-matters of the two actions are such as justly call for a settlement without further trial of issues of fact, and the effect of the order will be to finally adjust the rights of the parties without gaining advantage, or suffering harm from the fact that one judgment is prior in point of time to the other. *Knox v. Hexter*, 496.

### EXECUTORS AND ADMINISTRATORS.

A party who has rendered services to an estate after the death of the testator or intestate, but in pursuance of a contract made with the latter during his life, can recover the value of the same, in an action against the executors or administrators and where such an action has been brought, and a jury found the contract to have been made as claimed by the plaintiff, the verdict cannot be disturbed except for errors of law committed on the trial. *Ross v. Harden*, 427.

### FRAUD.

1. False representations and a suppression or omission to state all the liabilities of a firm, when professing to so do, for the purpose of obtaining credit, are equally inconsistent with honesty

and good faith. *Clafin et al. v. Moore et al.*, 262.

2. A party is not obliged to answer questions nor to volunteer statements in regard to his capital and business affairs, when seeking credit; but when he undertakes to give a statement of his affairs in order to obtain such credit, common honesty requires him to give a truthful and full statement, and under such circumstances, there is as much fraud in a suppression or omission to disclose an integral part of his liabilities in order to deceive the party from whom he seeks credit, as there would have been in making a false representation as to the amount of his assets. *Ib.*

8. It is impossible to reconcile alleged failures of memory in regard to large liabilities (which in this case exceeded the capital claimed in the statements and representations) with what is commonly known and recognized as honesty and fair dealing among business men. Such allegations cannot be received in justification of such suppressions and omissions. The approval of the acts of a party under such circumstances would be at variance with the settled principles on which mercantile transactions and commercial credit rest and are governed. *Ib.*

4. When the alleged fraud was merely a mistake from which no injury resulted, and the party who it is claimed committed the fraud, immediately on discovering the mistake, called the other party's attention to it, and the defendant, who is the one desiring the question to go to the jury, makes no allegation in his answer that there was any fraud in the bill (in respect whereof fraud is alleged at the trial), at the time of the settlement thereof, though the facts must then have been well known, the question as to fraud is properly

withheld from the jury. *Butler v. Am. Pop. Life Ins. Co.*, 342.

5. When assignment for benefit of creditors presumed fraudulent. See *Einstein v. Chapman*, 144.

See CARRIERS, 1; MONEY PAID INTO COURT, 2, 3.

#### FRAUDULENT CONVEYANCES.

1. At the time of the sale of the fixtures of a restaurant, and assignment of the lease of the building in which it was situated, to two vendees and assignees, an undivided half to each, the vendor handed the keys to one of the vendees, saying he thereby put him in possession. He then took them from that vendee and handed them to the other one with the same statement; the latter vendee then, for the time being, went behind the counter and commenced receiving checks from the customers; he took his breakfast and dinner at the restaurant, and was there during the evenings, and rainy days and Sundays; he had, however, been in the habit of going behind the counter, receiving checks, eating there, and being there evenings, rainy days, and Sundays, for a long time prior to the alleged sale. The vendor attended (except when detained by sickness) and went about the saloon as usual, and sometimes went behind the counter. A party who had been associated with the vendor, and had the principal charge of the business under him, still remained, and had full charge to run the place under the vendees, and did so in connection with the vendor. In fact, he was employed by one or both of the vendees to superintend and take charge of the business; he made all the purchases, but made those that were made on credit in the name of the vendees. There was no



- change in the signs. One of the transfers was made some time before the other; but at that time there was not even a formal delivery. *Held*, no actual and continued change of possession under the statute. *Burnham v. Brennan, Sheriff, &c.*, 49.
2. Symbolic and constructive delivery is not sufficient to satisfy the statute. *Ib.*
  3. Joint possession of transferor and transferee does not satisfy the statute. *Ib.*
  4. Where one to whom an undivided interest has been transferred, goes into possession thereof, and afterwards the remaining interest is transferred to another, the possession of the first transferee does not satisfy the statute requiring a change of the possession from the transferor to the second transferee of the property, the interest in which is transferred to him. *Ib.*
  5. That the property was left where it was at the time of sale, for the benefit of the vendees, and for the purpose of retaining customers and preventing the business from being broken up, does not dispense with the actual change required by the statute. *Ib.*
  6. If the party formerly conducting the business, continues to do so substantially as before, although employed by the transferee to superintend and conduct the business, his possession is not such possession of the transferees as the statute requires. The statute means to discountenance this. *Ib.*
  7. The sale of the property for its full value, which was paid, is not a sufficient compliance with the requirement of the statute as to good faith, if the motive for the sale and purchase on the part of the seller and purchaser was to hinder, delay, or defraud creditors, in the collection of their debts. *Ib.*
  8. If the transferor was actuated by an intent, &c., and the transferee had notice of such intent, the statute is not satisfied, whether the transferee paid any money or not. *Ib.*
  9. If the transferee has before him facts which would put an ordinary person on his guard, or create a suspicion, which, being followed up, would lead him to find out that there was a fraudulent intent on the part of the transferor, his abstaining from making such inquiry is a want of good faith. *Ib.*
  10. The meaning of the terms "hinder and delay" in the statute, is putting an obstacle in the path, or interposing some time, unjustifiably, before the creditor can realize what is owed out of his debtor's property. *Ib.*

## GENERAL TERM.

In the case at bar a party who had rendered services to an estate after the death of the deceased, but in pursuance of a contract made with him in his life-time sues his personal representatives for the value of said services. *Held*, where such an action has been brought, and the jury have found the contract to have been made as claimed by the plaintiff, the verdict cannot be disturbed except for errors of law committed on the trial. Where exceptions taken on such a trial are ordered to be heard in the first instance at general term, no question of fact can be considered by the general term; nor the point that the verdict is against the evidence; nor can the verdict be set aside on the ground that it is excessive; and the exception to the decision of the motion for a new trial on the minutes of the court, is also unavailable. The only mode for reviewing such decision is by an appeal from the order denying

the motion. *Ross v. Harden*, 427.

#### GOLD LOANS.

Mode of effecting and repaying stated. *Lally v. Colgate*, 544.

#### GOLD SALES ON CREDIT.

Conversion of gold price into currency price, one of the modes of stated. *Lally v. Colgate*, 544.

#### GUARANTY.

1. If the notes or other obligations the payment whereof is guaranteed, are void for usury, then if the guaranty has no other or different consideration than such notes or obligations, it necessarily falls with the notes or obligations. *Heidenheimer v. Mayer*, 506.
2. Demand of payment from principal, and notice to guarantor not necessary when the guaranty is absolute: *e. g.*, when the guaranty is as follows: "For and in consideration of the sum of one dollar, I hereby guarantee the payment of invoice of cargo covered by within contract." *Eneas v. Hoops*, 517.
3. An alteration or variation, materially affecting the contract guaranteed, will discharge the guarantor. This, although the variation may be to his advantage: *e. g.*, the guaranty was of the payment of the purchase-price of a cargo of nuts agreed to be sold and delivered. A subsequent agreement, made without the consent of the guarantor, that the vendee need not take the deck-load (if under the term cargo, used in the guaranteed contract, the vendee was bound to take the deck-load), will discharge the guarantor. *Ib.*

#### HUSBAND AND WIFE.

When husband can sue alone for libelous matter published con-

cerning wife. See *Bell v. Sun P. & P. Co.* 567.

#### INSURANCE.

1. In the case at bar, which was for a *pro rata* of loss on a policy, the court charged the jury, that it was for them to consider whether the acts and statements of the defendant, that were proved before them, had the effect on the plaintiff's mind of preventing him from presenting further and detailed proofs of his loss as required by the policy, and also from bringing the action on the policy within the time required by it, and if they found affirmatively, that the plaintiff was entitled to recover. *Held*, that there was no error in this charge. *Solomon v. Metr. Fire Ins. Co.*, 22.
2. If an insurance company holds out to parties insured, an officer or agent to represent it in respect to losses, and to speak for it at its office, in negotiations for the settlement and appraisal of losses, it cannot afterwards question his power to bind the company. *Ib.*
3. In an application for life insurance, the company have a right to insist and to stipulate that true answers be given to its inquiries in regard to the age of the applicant, and false answers in that respect will relieve the company from the conditions of the policy. *Neill v. Am. Life Ins. Co.*, 259.
4. If, by the proofs of death, it appears that the applicant was a year older than appeared from his original application, parol proof may be given, to show that the statement in such proofs was made by mistake. The insured is not estopped from showing the mistake. As the proofs of death in the case did not mislead or injure the company, nor cause it to do or to omit to do anything to its preju-

dice, estoppel *in pais* does not exist. *Ib.*

5. When mutual accounts are kept between the insurance company and the insured (the business being transacted between the acting officers of the company and the insured), the charging the premium to the account of the insured is equivalent to payment. *Butler v. Am. Pop. Life Ins. Co.* 342.
6. Where the assured makes a payment specifically appropriating it to the payment of the premium falling due on a certain day, and the company accepts the same, such payment and acceptance continue the policy in force, notwithstanding default in the payment of premiums which had previously fallen due. *Ib.*
7. Cancellation and practice of company as to actual entry thereof. *Ib.*
8. If a person contracting for life insurance make the payment of the policy conditional upon the absolute truth of his answers to questions in the application as to whether he has been afflicted, at any time, by any one of a long catalogue of diseases, he must be bound by it, although it may be oftentimes impossible for the applicant to answer correctly. The courts cannot set aside the conditions of such a contract, although the insured may have inadvertently erred—by failure of memory or otherwise—in an answer to any one of the numerous questions in the application. *Ritzler v. World Ins. Co.*, 409.

#### INTOXICATION.

See NEGLIGENCE, 6.

#### JOINT STOCK COMPANIES.

See CORPORATIONS.

#### JUDGE'S CHARGE.

See BAILMENT.

#### JUDGMENT.

1. Action against parties upon notes alleged to have been made by them as copartners under a certain firm name, and for goods alleged to have been sold them as such partners under such firm name. Defense by one, that he is a special partner, which is maintained; defense by another, averring the limited partnership, and denying that the notes were made by, or the goods delivered to, the defendants, and alleging that the notes were made by and the goods sold to one of the general partners in the name of the firm as such limited partnership, which allegations and denials are maintained. *Held*, that verdict and judgment should go in favor of the special partner, and against the others. *Lawrence v. Merrifield*, 36.
2. A judgment setting aside a transfer as fraudulent and void, directing the transferee to account before a referee, thereby appointed, for all property and effects and proceeds thereof received or held by him under the transfer; directing the referee to examine the accounts and doings of the transferee and decide with what sums of money or property he is chargeable, and report thereon; further directing that within ten days after notice of filing the report the transferee, in case no exceptions are filed, or in case exceptions should be filed, then in ten days after the confirmation of the report, pay and deliver over all such moneys and property to a receiver thereby appointed; further directing that out of the proceeds of such property and moneys the receiver pay the plaintiff \$458.50 the amount of plaintiff's judgment against the transferrors, with interest thereon, together with the costs of the action, and hold the residue, if any, to abide the further

order of the court; and further directing that any of the parties thereto might apply to the court for such other or further judgment or decree as might be just, constitutes a final judgment. *Produce Bk. v. Morton*, 472.

3. When judgment can be satisfied out of property held in trust for defendant. See *Parker v. Harrison*, 150.

See EXECUTION, 6.

### JURISDICTION.

Jurisdiction does not depend upon the intention of the officer or tribunal undertaking to act, but upon the facts upon which they act. *Carter v. Youngs*, 169.

### JURY TRIAL.

In an action for divorce *a vinculo*, each party has both a constitutional and statutory right to trial by jury. Reference or trial by the court can not be compelled. The right to a trial by jury may be waived in the manner prescribed by section 1009 of the Code of Civil Procedure. Sections 253, 266, 270, 271 of the Code of Procedure, rule 40 (formerly 33) of the rules in force prior to January 1, 1878; sections 968, 969, 970, 1013, of the Code of Civil Procedure; chap. 15, of the report of the commissioners to revise the statutes to the legislature of 1877, 2 *Edm. N. Y. Statutes*, 150; 1 *Rev. Stat.* 145, § 40; 1 *R. L.* 197; art. 1, § 2, Constitution of 1846, and ¶ 1, of § 6, of the so-called temporary act of June 2, 1877, referred to, commented on, and compared, with the above result. *Batzel v. Batzel*, 561.

See TRIAL, 3.

### LACHES.

See ESTOPPEL, 3; MORTGAGE, 3; NEW TRIAL, 2-3.

### LANDLORD AND TENANT.

1. The tenant has the right to insist that unless he can have the whole premises leased, he will take nothing and pay nothing; but if he accepts and occupies a part during the term, he becomes liable to pay (upon the principle of a *quantum meruit*) for that which he has actually occupied under the lease. *Knox v. Hexter*, 8.
2. In this case the plaintiff was a tenant of defendants, and held under a lease which reserved to the landlord the right of entering the premises "at reasonable hours in the daytime to examine, &c., and to make such alterations and repairs therein as shall be necessary for the preservation thereof or of the building." The defendant agreed to allow plaintiff one quarter's rent if he would permit needles to be inserted and remain in the walls of the premises for two weeks, in order to shore up or secure the building against the danger of excavations being made upon adjoining premises, and if they remained more than two weeks the defendant agreed "to make it right" with plaintiff. The needles remained for a period of about eight weeks, to plaintiff's injury, &c. *Held*, that the defendant was liable on his promise for the injuries committed and damages sustained, notwithstanding the conditions in the lease, and there was ample consideration for the promise. *White v. Mealid*, 163.
3. Two questions were presented to the jury in this case: Whether permission had been given to the defendant to remove the partitions; whether such removal caused any, and what amount of damage. The evidence was such that the jury might conclude that there was a license or permission, either in

the original lease, or subsequently, from a former owner, to the defendant to make the change, which was binding upon the plaintiff or ratified or recognized by him when he came into possession, and therefore the verdict of the jury for the defendant should be sustained.

*Aberle v. Fajen*, 217.

4. This action is analogous to former actions of waste, and to sustain it plaintiff must show an injury to the freehold or reversion. The jury had a right to look beyond the evidence as to the cost of restoration. Alterations of this kind are not necessarily acts of waste. They may be in some instances, and as was claimed by the defendant in this case, a benefit to the estate. *Ib.*

5. In case of a tenant holding over after expiration of term, the law implies an agreement to hold for another year on the terms of the prior lease. *Truomey v. Dunn*, 291.

6. Prior to May 1, 1875, defendant was in possession under a lease, the term whereof expired May 1, 1875, and the rent reserved thereby being payable quarterly on the usual quarter days. After May 1, 1875, defendant held over and continued in possession until May 11, 1875, when he moved out. This action was brought to recover a quarter's rent, falling due August 1, 1875, at the rate reserved by the lease, which expired May 1, 1875. The defense was that defendant was prevented from yielding up possession before May 11, by the act of God, in afflicting a cousin of defendant's wife, who was a member of his family, with a malady which confined her to her bed, and which was so great that it would have endangered her life to have taken her from the house. On the trial, after the evidence on both sides had been closed, the court directed a verdict for plaintiff. At gen-

eral term this direction was sustained, on the ground that the evidence failed to establish the facts constituting the defense pleaded, the court saying:

"This placing the decision on the evidence is not meant to imply that, if there were danger to her life or health in moving her, the defendant would not have been liable." *Ib.*

7. Payment or tender, within one year after the delivery of possession to the landlord, of all rent in arrear to the time of such payment or tender, and all costs and charges incurred by the landlord, is a pre-requisite to restoration of premises to lessee under chap. 240 (p. 293), of the laws of 1842, after delivery of possession to the landlord. Tender of the difference between such arrears of rent, costs, and charges, and either the gross or net profits received by the landlord during the interval, is not sufficient. An action against landlord for an account of the rents and profits received by him, and a restoration or redemption upon payment of the excess of the rent in arrear, costs and charges over the rent and profits, cannot be sustained. So, also, an action, founded on an averment that the rents and profits received by the landlord, exceeded the arrears of rent, costs and charges, for an accounting, for judgment against the landlord for the balance found due plaintiff on such accounting, and for judgment of restoration, cannot be sustained. *Pursell v. N. Y. Life Ins. & Trust Co.*, 383.

8. R. S. of N. Y., part 3, chap. 8, title 10, art. 2, section 43, is not repealed as to leases having an unexpired term of five years to run, by chap. 240 of the laws of 1842. *Ib.*

9. A lease was made to A, who formed a copartnership with B, for a term exceeding the de-

mised term, and the firm occupied a part of the demised premises (the rest having been sub-let by A, before the partnership with B), until November 18, 1875, when it was dissolved. The firm paid the rent up to November 1, 1875. On the dissolution, by arrangement between the partners, all debts owing to the firm, were to be received by B, and all demands against it were to be presented to him for payment. B gave public notice of this, and also that the business would be conducted in the name of B at the demised premises. B remained in the occupancy of the portion of the demised premises previously occupied by the firm, until February 1, 1876, when he was dispossessed. B collected of the sub-tenants to whom A had sub-let, the rents for their respective premises up to February 1, 1876, and deposited them in bank to his individual account. The lease to A contained a clause against under-letting without the written consent of the lessors. No consent was given to under-let to B. *Held*, in an action by the lessors to recover from B the quarter's rent, falling due February 1, 1876, the above facts appearing without contradiction, that he was holden as assignee. *Kernochan v. Whiting*, 490.

#### LEASE.

See LANDLORD AND TENANT, 1, 2, 9;  
LIFE ESTATE.

#### LEX LOCI.

See CONTRACTS, 14.

#### LIBEL.

1. The fire marshal of the city of Brooklyn, acting on information received by him from a party other than the defendant, subpoenaed the defendant to appear

before him upon an inquiry in relation to a fire which had occurred in Brooklyn, and upon defendant appearing, asked him various questions and reduced the answers (which were relevant and material to the subject-matter of the inquiry), to the form of a written deposition, to which he swore the defendant. *Held*, an action of libel would not lie against the defendant, founded on statements contained in the deposition, tending to charge plaintiff with arson, and this, even conceding such statements to be false. Taking the plaintiff's case that the above deposition was used as the foundation of a groundless prosecution; yet, as no proof of want of probable cause was given, the complaint was properly dismissed. *Newfield v. Copperman*, 302.

2. Where the words charged as libelous, are not actionable *per se*, the plaintiff cannot give evidence of any loss or injury sustained by the publication, unless it be specially stated in the complaint; and in such case the plaintiff must allege and prove that he has suffered some pecuniary damage by reason of the libelous matter. *Bell v. Sun Printing Co.*, 567.
3. The sole office of the innuendo is to explain. It cannot introduce new matter, nor in any degree enlarge the sense of the words to which it relates. *Ib.*
4. Where libelous matter is published concerning the wife, it is only when the action is maintained by reason of special damages to the husband that he can sue alone. *Ib.*

#### LIEN.

1. The attorney has a lien on the judgment in favor of his client, for compensation for his services. The measure of the lien is the sum agreed to be paid, or if



there is no agreement, then the reasonable value of the services, the sums recovered by a party, *sub nomine* costs, as an indemnity for his expenses, are, *prima facie*, the measure of the compensation to which his attorney is entitled, and of the reasonable value of the attorney's services. *Crotty v. McKenzie*, 192.

2. Defendant is not liable for compensation of plaintiff's attorney, after settlement between him (defendant) and plaintiff, unless notified before the settlement that plaintiff's attorney claims a lien; or unless the settlement was made collusively, without the knowledge of the attorney, with the view of depriving him of his compensation. Defendant's liability cannot exceed the amount of the verdict or judgment. *Ib.*
3. Attorney's lien cannot be enforced by issuing execution on a judgment satisfied of record. The satisfaction must first be vacated on motion. *Ib.*

#### LIFE ESTATE.

1. In regard to the payment of taxes, and interest on incumbrances, and for necessary repairs, no distinction can be made between life tenant, having a freehold estate in lands, and lessee for life on a nominal rent, each is alike bound in this respect. In this case, the plaintiffs leased and demised to defendant certain lands and tenements for the term of his (defendant's) natural life, at the annual rent of one dollar, with power to sub-let any part, or all of the same, and to collect the rents during the term. The lease contained no other covenants or conditions, and no re-entry clause. *Held*, that the defendant was bound to keep down the taxes, and keep the premises in repair, and an order appointing a receiver to collect the rents and apply

the same to the payment of accrued taxes and necessary repairs, was affirmed. *Carter v. Youngs*, 418.

2. The obligation of the life tenant does not rest in covenant, express or implied, but in equity, and exists as an incident to the estate; when, therefore, one contracts for a life-estate, he must be supposed to contract with reference to the incidents thereunto attached. The reservation of rent does not change the nature of the estate, nor create an equity in favor of the tenant for life, paramount to that of the reversioner or remainder-man. If there be any presumption from such reservation, it is that the amount of rent was fixed with reference to the obligations incident to a life estate, and not superseding or changing them. The tenant for life acquires an estate of freehold by virtue of the term, and irrespective of the manner or form in or by which it was created, whether by grant, devise, gift, or purchase, or by operation of law; and a charge upon the estate by way of rent, annuity or otherwise, does not affect the nature of the estate. *Ib.*

#### LIMITATION OF ACTIONS.

The legislature has power to give by statute, a remedy by action for a cause that has been barred by an existing statute. *People v. Starkweather*, 825.

#### LOANS.

1. Mode of effecting and repaying gold loans stated. *Lally v. Colgate*, 544.
2. Payment of money, when presumed a loan. See *Black v. White*, 446.

#### MALICIOUS PROSECUTION.

1. Want of probable cause must be proved to sustain an action for malicious prosecution. *Newfield v. Copperman*, 302.

2. A criminal complaint was made by A, against C and others, charging them with a conspiracy to defraud by means of false pretenses. On this complaint C was arrested, and gave bail to appear to answer any indictment that might be brought. B did not instigate or promote this prosecution, but after the bail had been given, he made, to the justice before whom A's complaint was made, a complaint against C for obtaining money by false pretenses, and asked for a warrant; the justice refused to issue a warrant, but told B that he could increase the amount of bail; he did not increase the amount of bail. All the complaints were sent to the district attorney, but it did not appear that B's complaint was brought before the grand jury. *Held*, that no prosecution had been set on foot by B. In this case, the action of the grand jury refusing to find an indictment on the charge preferred by A, and the consequent discharge of C from the recognizance given by him on that charge, is not an ending of the prosecution set on foot (if any such was so set on foot), by B. *Kneeland v. Spitzka*, 470.

See LIBEL, 1.

#### MAXIMS.

1. When one of two innocent persons must suffer by the wrong of another, the one who enables such other to commit the wrong must suffer the consequences. *Lally v. Colgate*, 544.
2. "Verba intentioni et non e contra debent inservire, ut res magis valeat quam pereat." *Fairchild v. Lynch*, 265.
3. "Respondeat superior." *Earl v. Beadleston*, 294.

#### MONEY HAD AND RECEIVED.

See PAYMENT OF MONEY.

#### MONEY PAID INTO COURT.

1. Money paid into court and held

in its custody, is a deposit of such a character that it is a stringent duty of the court and all its officers to protect the same by all the lawful means within their power, from fraudulent diversion or misapplication. *Keiley v. Dusenbury*, 238.

2. When a wrongful payment of money, in the custody of the court, has been procured by collusion or by fraudulent concealment or false representations, the parties to such acts, or those profiting thereby and obtaining the money, acquire no legal title to the same, and the person rightfully entitled thereto has his remedy by action to recover the money, &c., and in some cases, by proceeding summarily against the wrongdoers. *Ib.*
3. The recitals in an *ex parte* order directing the custodian of the money to pay the same, as to who is or who appears to be the person entitled to the same, do not protect the wrongful recipient of the fund from liability for the same to the person rightfully entitled to it, when the order has been procured by collusion or fraud practiced upon the court. Such an order has none of the elements to constitute a bar, as *res adjudicata* against the lawful claimant. *Ib.*

#### MORTGAGE.

1. The plaintiff, a resident of Port au Prince, Hayti, was the owner and in possession of the vessel in question prior to the execution of a mortgage upon the same in August, 1870, to one Ballon, to secure the payment of three thousand pounds. Ballon, upon the same day the mortgage was made, assigned the same to Oliver Cutts & Co., of Port au Prince, Hayti, who took and held possession of the vessel under the mortgage and assignment, and at the time of the collision (in December,



1874), the vessel was in possession of parties by virtue of letters of attorney from Cutts & Co., and these parties were entitled to the profits of the vessel, but for the collision. The vessel was registered in the name of the plaintiff, and the mortgage and assignment of the same recited the fact that the vessel was the property of the plaintiff, "as per register," and the mortgage had not been foreclosed. *Held*, that under these circumstances, the plaintiff's title to the vessel and his rights therein were such, that he was entitled to sue for damages for an injury to the vessel, notwithstanding he was not in possession, and had not been for some years, and was not entitled to her earnings or profits at the time of the collision. *Wilson v. Knapp*, 25.

2. The plaintiff can tender the amount due on the mortgage and redeem his vessel; or, if she has earned enough to satisfy the mortgage, he can compel an accounting, and thus redeem her. *Ib.*
3. The improbability of redemption, and the lapse of four years without any effort for redemption, are not facts which of themselves divest the plaintiff of his legal right to redeem the vessel. *Ib.*
4. The trespasser cannot avoid his liability for the damage he inflicted upon the vessel, by setting up the rights or equities of other parties in the same, who are cognizant of the facts and have notice of the plaintiff's action, and approve and promote the same. *Ib.*

#### MOTIONS AND ORDERS.

See BILL OF PARTICULARS, 2; EXECUTION, 6; MONEY PAID INTO COURT, 3; NEW TRIAL; REFERENCE, 5; RECORDS.

#### MUNICIPAL CORPORATIONS.

The doctrine that money voluntarily paid (there being no mistake of fact or fraud) cannot be recovered, does not apply where money is paid by an officer or agent of a municipal corporation. *People v. Starkweather*, 325.

#### NEGLIGENCE.

1. Although the general rule is that a person approaching a railroad crossing should use both eyes and ears to discover and avoid an approaching train, there may be circumstances, or a state of facts, existing in some cases, where the most vigilant exercise of these organs will fail to warn and protect him, and in such cases the law does not charge a person with contributory negligence. *E. g.*, the present case, where another long train of cars was passing in an opposite direction, and making a great noise, tending to show that if the bell of the train by which the injury was committed had been rung, the person injured could not have heard it. Also, where the noise was caused by a wagon, or by a steam saw-mill, or by falling water, or by another train. *Leonard v. N. Y. O. & C. R. R. Co.*, 225.
2. In cases like the present one, the law requires the exercise of such a degree of care as prudent persons, knowing the danger to be encountered, and giving attention to their safety, would use to shield themselves from danger, and the question whether a person crossing a railroad track is negligent in not looking or listening for an approaching train, and whether he could have stopped in time to avoid the danger, are questions for submission to the jury. *Ib.*
3. In this class of cases, when the conduct of the plaintiff is mixed with, and dependent upon, the acts of the defendant, and

upon the surrounding circumstances, the questions of negligence fairly belong to the jury, in its general consideration of the whole facts of the case, and should be submitted to them. *Ib.*

4. A railroad company operating trains upon a road owned by another company, is liable for negligence in running its trains thereon, and for the negligence of the flagmen stationed at the crossings, and for other servants or employees engaged in the signal service of that road. It is immaterial, so far as the public or the person injured is concerned, to whom the road or its signal service or other appurtenances that are in use at a crossing belong. The duty that there shall be no negligence in the premises devolves and rests upon the company running the trains by which a person is injured. *Ib.*

5. In this case the court, upon a full review of the facts and circumstances, set forth in the opinion, held that the proofs established that the accident which was the ground of the action was caused by defendant's negligence, and that the plaintiff was not guilty of contributory negligence. *Hawks v. Winans*, 451.

6. Intoxication will not constitute contributory negligence unless its degree is such as to justify the jury in finding that the party was thereby disqualified from the exercise of ordinary care and prudence. The bare circumstance that he had indulged sufficiently in spirits to make the fact perceptible from his breath, is not sufficient to justify the jury in so finding. *O'Hagan v. Dillon*, 456.

See BAILMENT; BANKS & BANKING, 2; CARRIERS, 1, 2, 4-6.

#### NEW TRIAL.

1. In case where new trial is asked

on ground of newly discovered evidence, facts within the knowledge of the conductor of the train upon which an accident occurs, may properly be deemed within the knowledge of the company. *Weston v. N. Y. Elevated R. R. Co.*, 156.

2. The fact that the defendant's superintendent failed to inform himself of such facts by inquiry of the conductor, affords no ground for ordering a new trial, especially where, as in this case, the conductor was known to the defendant's counsel to be a material witness for the defense. Ordinary diligence on the part of the defendants would have informed them of all the facts within the knowledge of the conductor, and the omission to interrogate him fully was wholly inexcusable. *Ib.*

3. In applications of this character (which are not regarded with favor), the applicant must show that he has done all in his power in acts tending to discover the testimony, and that the failure was not owing to any delinquency on his part. If the least fault be imputable to him, he will ask for relief in vain. *Ib.*

4. Motion for new trial on the minutes must be made at the same term at which the cause is tried. Special term order made within four days of the end of the term at which the cause was tried, upon notice and after hearing counsel for both sides, granting leave to move for a new trial on the minutes does not authorize such motion after the expiration of the term at which the cause was tried. *Ibbotson v. King*, 207.

5. When there is a conflict of evidence on the facts submitted to the jury, and no motion is made either to dismiss the complaint on the ground that the plaintiff had failed to prove a cause of action, or for a direction to the jury to find a verdict for defend-

ant on the ground of insufficiency of the evidence to sustain a verdict against him, a motion for a new trial on a case made will not be granted, either on the ground that the verdict is without evidence, or on the ground that it is insufficiently supported by the verdict. On such a motion, the question whether the facts so submitted, even if found in plaintiff's favor, will warrant in law a verdict for him, cannot be raised if there are no exceptions sufficient to bring it before the court. *Ib.*

6. If a jury find for a defendant when they should have found nominal damages for the plaintiff, it furnishes no ground for a new trial. *Aberle v. Fajen*, 217.
7. When motion for new trial can be made under section 268, Code. *Produce Bk. v. Morton*, 472.

#### NEW YORK CITY.

1. Under section 150, article 13 of ordinances of 1859, giving him commission on assessments paid and on certain unpaid assessments, the collector of assessments can make no charge in respect of assessments assessed on the city. (a.) He cannot either personally or by virtue of his office, do anything beneficial to the city in respect of such assessments. (b.) The including under the ordinance of July 18, 1853, in the assessment list, commissions on the amount of the assessment upon the city at the rate fixed by section 150, article 13 of the ordinance of 1859, does not entitle the collector to receive them. (c.) Confirmation of reports of commissioners of estimate and assessment, is not an adjudication that the sum contained therein for the expenses of collection, is due or payable to the collector. (d.) An act authorizing the city to raise funds to pay assessments charged to or assess-

ed upon the city, in which is included a percentage for the collection thereof, gives the collector no right to the percentage. (e.) A payment by the officers or agents of the city to the collector, not authorized by said ordinance of 1859, does not fall within the principle which prevents the recovery of money voluntarily paid. *People v. Starkweather*, 325.

2. Landscape architect employed by the Department of Public Parks, does not hold an office, and is not an officer within the meaning of the 114th section of chap. 335 of the laws of 1873. *Olmstead v. Mayor, &c.*, 481.

#### NOTICE.

When notice to defendant is necessary to preserve attorney's lien on judgment for costs. See *Crotty v. McKenzie*, 192.

See BILLS, NOTES AND CHECKS, 1, 2; CARRIERS, 3; CONTRACTS, 6; EXECUTION, 8; PARTY WALLS, 2.

#### PARTIES.

When a party sells to B 1-8 and to C 1-8 of certain personal property, to arrive, B agreeing to purchase the 1-8 and C the 1-8; the terms of the contract being, that the property on arrival should be entirely under the control of the seller, and be sold at auction or private sale, at his option, and the profits or loss resulting from such sale should be due and payable on rendering of accounts; and a broker acting for both purchasers makes a single bought note, containing above terms of purchase, the seller may bring a separate action against each purchaser for his share of the loss. There is no such joint interest as requires their joinder as defendants. *Lawrence v. Gallagher*, 309.

See LIBEL, 4.

## PARTNERSHIP.

1. The effect of a cash payment by a special partner under the statute relating to limited partnerships, does not depend on the means used by the special partner to obtain the money, so long as the ownership of the money paid in is in the special partner. *Lawrence v. Merrifield*, 36.
2. When the owner of money pays it into the common stock, under the forms of the statute, and it is thereafter left to the risk of the business, with an accompanying intent so to pay and so to leave it, and with no intent and no purpose of making such payment and devotion of the money to the business otherwise than real, actual or absolute, the requirement of the statute as to good faith in said cash payment, is satisfied. *Id.*
3. In case of an attachment against one member of a firm, in an action against the copartners upon a firm debt, only the right and interest of the partner against whom the attachment issued, in the partnership goods, which is the surplus remaining after the firm debts have been paid, can be seized. *Doane v. Lindsay*, 399.

See JUDGMENT, 1.

## PARTY WALLS.

1. Neither party interested in a party wall can of his own head do or cause anything to be done which will weaken the wall perpendicularly. If the necessary consequence of such acts is to weaken the wall, that interested party who did or for whom the things were done, will be liable for the damages sustained by others; and that whether the things were done by his own hand, or the hands of others hired by him, or by the hands of workmen employed by one who had contracted with him to per-

form the work. Doctrine of *respondent superior* does not apply. If the weakening of the wall be not the necessary consequence therefrom, but results only from want of care and skill in doing the work, the party interested in the wall is not liable for damages resulting from the want of care and skill, on the part of the workman employed by one who has contracted with him to do the work. Doctrine of *respondent superior* applies. *Earl v. Beadleston*, 294.

2. The act and operation of tearing down one of the two buildings, whose beams rest in a party wall, does not involve, as a necessary consequence, the weakening of the wall. It may be taken down by the use of ordinary care in such manner as to leave the wall as strong as it was. Therefore, under a contract to "take the building down," the owner who gave out the contract is not liable for injuries sustained through the weakening of the wall, by the careless or unskillful performance of the work, on the part of the workmen employed by the contractor. It is not necessary in such case to give notice of the intention to take down the building. *Id.*

## PAYMENT OF MONEY.

1. The doctrine that money voluntarily paid (there being no mistake of fact or fraud) cannot be recovered, does not apply where money is paid by an officer or agent of a municipal corporation without authority. *People v. Starkweather*, 325.
2. Proof of the delivery of money, its reception and use, is not proof of an obligation on the party receiving and using it to return the same, and consequently does not establish an implied promise. In proof of a count for money lent, &c., it is

not sufficient to merely show that the plaintiff paid money to the defendant; such proof is *prima facie* evidence only of the payment by the plaintiff of his own debt, antecedently due to the defendant. The plaintiff must also prove that the transaction was essentially a loan of money to the defendant. A very slight circumstance may establish that it was a loan, or that it was paid at the request of the receiver, but there must be that circumstance to overthrow the legal presumption. *Black v. White*, 446.

See N. Y. Crry, 1.

#### PENALTIES.

1. Under the general or revised statutes it is provided as follows: "Upon every process issued for the purpose of compelling the appearance of the defendant to any action for the recovery of any penalty or forfeiture, shall be indorsed a general reference to the statute by which such action is given, in the following form, 'According to the provisions of the statute regulating the interest on money,' or 'according to the provision of the statute concerning sheriff,' as the case may require, or in some other general terms referring to such statute." The object of this provision was to inform the defendant of the nature of the action, when the same was commenced by the ordinary process (*capias*) of the courts of record before the adoption of the Code; but when the action was commenced by the service and filing of a declaration, which contained the information, it was held to be a compliance with the statute. *People v. Bull*, 19.
2. The same principle has been applied to the present practice, and it has been held, that where the information is contained in the complaint attached to and

served with the summons, that the statutory requirement is fulfilled. *Ib.*

3. Under the Code, there is just reason to hold that the statute above mentioned is not in force. *Ib.*

#### PERSONAL PROPERTY.

See MORTGAGE.

#### PLEADING.

1. A denial in an answer, of an averment of rendition of services in a certain capacity, is not a denial of an averment of recognition and employment in such capacity. *Ryan v. Mayor, &c.*, 202.
2. In this case, the action was brought on a contract. The defense was an account stated. *Held*, a reply denying the account stated, or if admitting it, the setting forth that plaintiff was erroneously debited or credited therein (as the case may be) in respect of the cause of action, is not necessary. Nor is it necessary to amend the complaint by inserting allegations of error in the account, with a view to open it. *Welsh v. Germ. Am. Bk.*, 462.

See LIBEL, 2-4; TRIAL, 2.

#### POSSESSION.

Continued change of possession required by statute in relation to assignments for benefit of creditors. See *Einstein v. Chapman*, 144.

#### POWER OF ATTORNEY.

See CONTRACTS, 9; EVIDENCE, 13.

#### PRACTICE.

See APPEAL, 1, 2; ATTACHMENT; BILL OF PARTICULARS; COSTS; EXECUTION, 2, 3, 6, 7; NEW TRIAL; PENALTIES; REFERENCE; SERVICE.

**PRESUMPTION.**

Presumption of fraud, when raised by statute, in case of assignment for benefit of creditors. See *Einstein v. Chapman*, 144.

See **BILLS OF LADING; CONTRACTS**, 12; **LANDLORD AND TENANT**, 5; **PAYMENT OF MONEY**, 2.

**PRINCIPAL AND AGENT.**

1. Agent is personally liable to vendor, when he does not disclose the name of his principal at the time of the sale, although the vendor knows that he is acting as agent in the purchase. *Cobb v. Knapp*, 91.
2. Where the goods sold are used in the manufacture of an article, and at the time of the sale there is a direction given to deliver at a certain manufactory of the article, known by a certain appellation, *e.g.*, Tower's distillery, there is not a sufficient disclosure of the principal; it not appearing that the vendor had any knowledge as to who was carrying on the business of the factory, and no disclosure being made at the time of the names of the parties carrying on the business. *Ib.*
3. Vendor, in case of undisclosed principal, may, on discovery of the principal, sue either the principal or the agent, or both. *Ib.*

See **BROKERS; INSURANCE**, 2; **NEW TRIAL**, 1, 2; **SERVICE**, 5.

**PROSPECTUS.**

When prospectus and acceptance offer contained therein and action thereunder, do not constitute contract. See *Demuth v. Am. Inst.*, 336.

**QUESTIONS OF LAW AND OF FACT.**

See **NEGLIGENCE**, 2, 3.

**RATIFICATION.**

See **BANKS AND BANKING**, 3; **CORPORATIONS**, 4.

**RE-ARGUMENT.**

When it appears from the decision of the court of appeals in dismissing an appeal from the decision of the general term, that the case appealed from was not properly before the general term, a re-argument should be ordered, although this court has decided that in matters purely technical, and not affecting the general law of the case, or the real merits of the controversy, a re-argument should not be allowed. But it should be granted on payment of costs. *Produce Bk. v. Morton*, 124.

**RECEIVERS.**

A receiver is clothed with no powers to waive the equitable rights of the judgment creditors, for the protection of whom he was appointed. *Keiley v. Dusenbury*, 238.

**RECORDS.**

1. It is a necessary incident to the powers and jurisdiction of a court in the administration of justice, that it should have control over its files and records to prevent their use wrongfully. And such control can be enforced by order, as in this case, when court ordered case on appeal off the files of the court, on the ground that case was not filed as settled. *Tyng v. Marsh*, 235.
2. When records received as evidence by appellate court. See *Burnham v. Brennan*, 49.

**REDEMPTION.**

See **MORTGAGE**, 2, 3.

**REFERENCE.**

1. A referee found the ex-



pense of certain work was four hundred dollars, and that he found no evidence to enable him to specifically detail the several items of this expense, to which the defendants excepted. *Held*, that if the defendant wished the referee to find the items making up this amount, he should have in some way furnished the evidence. *Wilson v. Knapp*, 25.

2. It has been held that no exception lies to the refusal of a referee to find the particulars which go to make up his general conclusions of fact. *Ib.*
3. There is no power in the court to compel a referee to hear and determine, to open the case after a party has rested. *Dow v. Darrah*, 80.
4. Opening of case after party has rested, rests in the sound discretion of the referee. *Ib.*
5. Review of discretion cannot be had on motion to compel the referee to open. *Ib.*
6. When the party before he rested had full opportunity to discover the facts which he subsequently proposes to prove, and the evidence thereof, and after he rested his adversary departed for his place of business and residence in a distant country; it is a proper exercise of discretion to refuse to open the case to admit proof of such facts on an allegation that they were not discovered until after the departure of the adversary. *Ib.*
7. An order of reference to ascertain damages will not be granted under an undertaking given on an injunction, when it is perfectly clear that no action on the undertaking will lie. If it be not perfectly clear that no action will lie, the order will be granted. *Palmer v. Foley*, 365.
8. Reversal of judgment entered on report of referee, on question of fact. *Ibbotson v. Sherman*, 477.

See DIVORCE.

## RENT.

See LIFE ESTATE.

## REPLEVIN.

See EXECUTION, 4, 5.

## RES ADJUDICATA.

1. Although the reports of the commissioners of estimate and assessment of New York city, confirmed by the court, contain a percentage on the amount assessed to the city for the collection thereof, the confirmation thereof is not an adjudication that such percentage is due or payable to the collector. As an adjudication *in rem* it only adjudges that the percentage is a proper provision to indemnify the city against future contingencies, and is a provision for the benefit and use of the city only. The collector not being a party, nor in privity with a party, cannot take advantage of the adjudication. *People v. Starkweather*, 325.
2. In case of a contract calling for payment by installments, the recovery of judgment for first installment, is conclusive as to the validity of the contract. Also as to matters necessary to be established to warrant the judgment for the first installment, and equally necessary as a foundation for the recovery of each of the other installments. *Ibbotson v. Sherman*, 477.

See MONEY PAID INTO COURT, 3.

## RESPONDEAT SUPERIOR.

See PARTY WALLS.

## REVERSAL OF JUDGMENT.

See APPEAL, 4-6.

## REVISED STATUTES AND SESSION LAWS.

Laws 1848, chap. 40, §§ 10 & 11. Manufacturing corporations. See *Brown v. Torrey*, 1.

- Laws 1853, chap. 333, § 2. *Ib.* See *Ib.*
- 2 R. S. (Edmonds' Ed.) 573, 612. *Ib.* See *Ib.*
- 2 R. S. 481, § 7. Action to recover penalty. See *People v. Bull*, 19.
- 1 R. S. (Edmonds' Ed.) pp. 716, 717, §§ 2, 7, 8. Special partners. See *Lawrence v. Merrifield*, 36.
- R. S. part 2, chap. 7, title 2, § 5. Fraudulent conveyances. See *Burnham v. Brennan*, 49.
- 3 R. S. (5 Ed.) 988, § 33. Incompetency of witness convicted of felony. See *Nat. T. Co. v. Roberts*, 100.
- 2 R. S. 136. Change of possession on assignment for benefit of creditors. See *Einstein v. Chapman*, 144.
- 2 R. S. 273. Creditor's suit. See *Parker v. Harrison*, 150.
- Laws 1853, chap. 511. Substituted service. See *Carter v. Youngs*, 169.
- Laws 1870, chap. 408, § 13. Rules of court. See *Tyng v. Marsh*, 235.
- 1 R. S. 730, §§ 69, 70, 71. Resignation of assignee. See *Keiley v. Dusenbury*, 238.
- Laws 1873, chap. 501. Re-filing chattel mortgage. See *Kohler v. Matluge*, 247.
- Laws 1875, chap. 49. Speculation act. See *People v. Starkweather*, 325.
- Law of N. J., approved Feb. 14, 1846, § 5. Corporations. See *Griffith v. Mangam*, 309.
- 2 R. S. 515, §§ 39, 43. Summary proceedings. See *Pursell v. N. Y. Life Ins. & T. Co.*, 383.
- Laws 1842, chap. 240. Restoration of premises taken under summary proceedings. See *Ib.*
- 3 R. S. (5 Ed.) 201, §§ 2, 3. Executors, &c. See *Ross v. Harden*, 425.
- Laws 1873, chap. 335, § 114. City officers. See *Olmstead v. Mayor, &c.*, 481.
- 2 R. S. (Edmonds' Ed.) 150, § 40. Trial of actions for divorce. See *Batzel v. Ib.*, 561.
- 1 R. L. 197. *Ib.* See *Ib.*
- Act June 2, 1877 (temporary act). See *Ib.*

### RULES OF COURT.

- Authority and force of the rules of court was provided for in section 470 of the Code, and in laws of 1870, chapter 408, section 13. When the statutes or the rules of the courts do not cover a case, the rules of the court of king's bench are followed. *Tyng v. Marsh*, 235.
- 44 General rules. See *Tyng v. Marsh*, 235.
- 10 Sup'r Ct. rules. See *Ib.*
- 40 (formerly 33), General Rules. See *Batzel v. Batzel*, 561.

See APPEAL, 2.

### SALE.

1. Upon a bill of lading whereby wheat was shipped by A, consigned to C, at the city of New York, to be delivered to C or its order, on payment of freight and charges, C indorsed a letter directed to B, stating that the bill of lading, with insurance on the same, were pledged to it (C), as security for the payment of an accompanying draft drawn on him (B); and that the property was placed in his (B's) custody in trust for that purpose, and that it was not to be devoted to any other use until the draft was paid; and that upon his (B's) accepting and paying the draft, its (C's) claim would cease. C sent the draft with the bill of lading attached to its correspondent at New York, who presented the same to B, who accepted them, and detached and retained the bill of lading and certificate of insurance annexed. B did not pay the draft. *Held*, The property in the wheat did not pass to B. On or shortly after the arrival at New York of the boat on which the wheat was shipped, but before its delivery to any



consignee B procured a sample thereof, and sold the cargo by such sample at the Produce Exchange, to D, who knew that the cargo was afloat and had not been delivered to any consignee. B, by producing to the carrier's agent, the aforesaid bill of lading, prevented a delivery of the wheat to D. *Held*, the draft having been dishonored, that D acquired no title to or property in the wheat as against C. *Farmers' Bank v. Brown*, 522.

2. There is no reason for applying to a sale of cargo of fruit to arrive, any other rule of law than is applied to a sale of a cargo of iron or grain. An undivided interest may be sold, and delivered either by a fair division or the delivery of a bill of sale to pass the title in præsentî. *Lawrence v. Gallagher*, 309.

3. One of the modes of conversion of gold price into currency price in gold sales on credit, stated. *Lally v. Colgate*, 544.

See TITLE, 1.

### SERVICE.

1. The act of 1853, in relation to substituted service of summons and complaint, is applicable to cases in which the defendant, if a resident of the State, cannot be found after proper and diligent effort to effect service upon him, or, to cases in which, if found, he avoids or evades such service. These provisions are in the alternative form, and are not coupled conjunctively; if, therefore, it sufficiently appeared by the affidavit, upon which the order was made, that the defendant could not be found (no question being raised as to the earnestness or diligence of the effort to find him) the order was properly granted. *Carter v. Youngs*, 169.

2. The word found, as used in the the statute, is the equivalent of the Latin word *inventus*. The

primary definition of the verb to find, is to come to, to meet, and hence to reach, to attain to, to arrive at. *Ib.*

3. It appears by the affidavit upon which the order was granted in the case at bar, that the officer charged with the service of the summons, was unable to reach or get at the defendant so as to serve him personally, and such inability afforded sufficient grounds for a resort to other service, which this statute provides in cases where the defendant cannot be found, even although the defendant did not attempt to evade or avoid personal service. *Ib.*

4. Although the order appears to have been made on the ground of an evasion or avoidance of service, it was not irregularly or improvidently granted. The question is, does the law authorize the act upon the facts appearing in the case, namely, that the defendant could not be found by the officer. *Ib.*

5. Ch. J. CURTIS, in an opinion that concurs in the result, holds that under the facts in the case, the defendant, through his wife as his agent, or acting for him in the premises at the time, declined or avoided the service, and the order for substituted service was authorized thereby. *Ib.*

### SHERIFF.

See EXECUTION, 1-5.

### STATUTE OF FRAUDS.

1. The change of possession required by the statute must be not only actual but continued, or it will be presumed fraudulent. *Einstein v. Chapman*, 144.

2. In the case of *Tilson v. Terwilliger*, 56 N. Y. 273, immediate delivery was made, and actual possession retained, by the purchaser about a year before the property came again into the hands of the vendor, to be kept

by him for the purchaser. It was held that the possession was not continued as required by the statute, and therefore the sale was presumptively void as against a creditor of the vendor. *Ib.*

3. When it appears, as in this case, that the possession was not continued or retained by the purchaser, the burden of proof to establish that the assignment was made in good faith, and without intent to defraud creditors, rests upon the defendants. *Held*, that the evidence in this case was insufficient to remove the legal presumption of fraud which arose from the change of possession from the assignee to his assignor, which the statute raises imperatively. *Ib.*

#### STATUTES.

Doctrine of repeal by implication, considered. See *Purseil v. N. Y. Life Ins. & T. Co.*, 383.

#### STOCKHOLDERS.

1. When stockholder estopped from denying authority of company to make note in suit. See *Brown Bros. v. Torrey*, 1.
- 2 Liability of stockholders for debts of company. See *Ib.*

See CORPORATIONS, 5,

#### SUBSTITUTED SERVICE.

See SERVICE.

#### SUMMONS.

When indorsement required by statute in action for penalties may be omitted from summons. See *People v. Bull*, 19.

See SERVICE.

#### SUPPLEMENTARY PROCEEDINGS.

The court may appoint a receiver of a member's property in a seat in cotton exchange, and then

compel an assignment to such person (being a member or member elect) who shall become a purchaser from the receiver, or to a member or member elect, in trust, to assign to such person (being a member or member elect) who shall become a purchaser from the receiver. *Ritterband v. Baggett*, 556.

#### SUPREME COURT.

Its jurisdiction in matter of resignation of assignees for benefit of creditors exclusive. See *Keiley v. Dusenbury*, 238.

#### SURETIES.

See UNDERTAKINGS, 3-5.

#### TAXES AND ASSESSMENTS.

See LIFE ESTATE; NEW YORK CITY, 1.

#### TENANCY IN COMMON.

See EXECUTION, 4, 5.

#### TENDER.

See CONTRACT, 1, 2.

#### TITLE.

1. B, doing business at New York, sent an order to A, doing business at Buffalo, to buy wheat for him and ship it, advancing the purchase price himself. A, not having the money with which to pay the purchase price, applied to the cashier of C (a bank at Buffalo), stating he had the order to buy, and asking if the bank would discount a draft at 20 days, drawn on B at New York for an amount sufficient to pay for the wheat, with the bill of lading consigning the wheat to the bank as security; the bank consented to do so. A thereupon purchased the wheat ordered by B, and shipped it, consigning it not to B, but to

the cashier of the bank, and drew a draft on B for the purchase money, but only agreed to deliver the wheat to the drawer upon condition that the draft should be accepted and paid. The bank discounted the draft, receiving from A the bill of lading for the wheat as security, and gave A a check for the proceeds of the discount, with which A paid the purchase price of the wheat. A made the purchase as principal vendee without disclosing to his vendor for whom he was acting. After the order to purchase, but before the purchase, B wrote to A, asking him not to draw for any margin, but to advance the whole purchase price himself, assigning as a reason that prior thereto he had purchased on his (B's) order, and had drawn on him at sight for part of the purchase money, known as "margin," and a time draft for the balance, which he (A) had procured to be discounted by the Bank of Commerce, in Buffalo, with a bill of lading as collateral; and the Bank was refusing to deliver the bill of lading until the time draft was paid; and he (B) was trying to get the bill of lading in that case, and suggesting to A to consign to his (B's) "care" instead of "notifying me." *Held*, that (1.) A, upon the purchase, became the owner of the goods, with full power and authority to dispose of it as he saw fit. (2.) A, by his transaction with the bank, transferred his title and ownership to the bank. *Farmers' Bank v. Brown*, 522.

2. In case of joint defense at joint expense, under an agreement therefor, for the purpose of establishing title to the subject of the litigation for the benefit of parties mentioned in the agreement. Although the expense in procuring rents and profits of the subject of litigation is not

an expense incurred in establishing the title, yet it is so connected with its establishment by increasing the benefit to be derived therefrom, in which increase the parties are interested under the agreement, that it falls within the items of expenses to be jointly borne. *Ponvert v. Belmont*, 531.

See MORTGAGE.

### TRESPASS.

See EXECUTION, 4, 5 ; MORTGAGE, 1, 4.

### TRIAL.

1. Evidence tending to contradict the facts in the case as claimed and proved by the plaintiff, makes a case for submission to the jury, and a dismissal of the complaint is error. *White v. Meulio*, 163.
2. An order sustaining a demurrer with leave to defendant to amend, is a determination that the averments in the defense demurred to constitute no defense; and remaining unreviewed, the determination is conclusive on the trial of the cause. *Ryan v. Mayor, &c.*, 202.
3. Where a party proceeds to a trial before the court without a jury, and without objection or a demand for a trial by jury, he must be deemed to have waived his right to a trial by a jury, if any he had. *Keiley v. Dusenbury*, 238.

See BAILMENT.

### TRUSTS.

1. A trustee who, through a purchase in his own name, and for his own benefit, of property belonging to the *cestui que trust*, in relation whereof he is trustee, from one holding the same same in pledge, or hypothecation, or under a mortgage or lien, in a manner in which he is

authorized to sell, acquires possession thereof, is chargeable with a conversion. *Smith v. Frost*, 87.

2. Although the trustee acquires the possession rightfully for the purposes of the trust, yet if, when by the terms of the trust, the property is deliverable to the *cestui que trust*, he on demand refuses to deliver, he is chargeable with a conversion. *Ib.*

3. The *cestui que trust* need not base his action on the agreement which raises the trust. He may bring a common law action of trover for the conversion. *Ib.*

4. The property and trusts created by an assignment for the benefit of creditors, cannot be transferred by the resignation of the trustee in favor of some one else, unaccompanied with the consent of the *cestuis que trust* or the order of the supreme court. *Keiley v. Dusenbury*, 238.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; CREDITOR'S BILL.

#### UNDERTAKINGS.

1. The plaintiff obtained an order requiring defendant to show cause why an injunction should not be granted against him, and in the meantime enjoining defendant; on this temporary injunction the undertaking in question was given; on the return of the order to show cause, the court, after hearing both parties, ordered that the order to show cause be made absolute, and that defendant be enjoined, etc. On appeal by defendant from this order, the general term modified it, and affirmed it as modified. After this, defendant's attorney gave a consent for the discontinuance of the action without costs. Upon this consent plaintiff entered an order of discontinuance without costs. Defendant's attorney gave the consent on receiving \$100 for costs.

*Held*, that it was not perfectly clear, that there was no right of action on the undertaking; that there was enough doubt on that point to authorize an order of reference as to damages. *Palmer v. Foley*, 365.

2. The release by the party to whom the first undertaking is given or his assignee, of the sureties to that undertaking, does not release the sureties on a subsequent undertaking given to him in the same action. *Brennan v. Arnstein*, 375.

3. Payment in whole or in part by the sureties to a prior undertaking reduces the liability of the sureties on a subsequent one to the party to whom it is given, by the amount of such payment. *Ib.*

4. Where the undertaking in an action is insufficient to stay execution, but was accepted as sufficient and all proceedings stayed on the faith thereof. *Held*, that the sureties were liable thereon. *Ib.*

5. A release of the sureties to the undertaking given by the plaintiff on taking the property in claim and delivery from the defendants upon a receipt from them of a portion of the amount for which they are bound under their undertaking, will not release the sureties to an undertaking given by the plaintiff on appeal to the general term from a judgment rendered against him in the action for the purpose of staying execution; but they are entitled to have credited on the amount for which they are bound the sum received from the sureties on the first undertaking. *Brennan v. Arnstein*, 375.

See REFERENCE, 7.

#### USURY.

Charges of specific sums or certain percentages for prospective commissions and losses or expenses on and for the anticipated

borrowing, by the creditor, of the sum forborne during the period of forbearance, the debtor agreeing to pay such charges at all events, whether the commissions be earned or not, or whether the losses and expenses occur or not, constitutes usury. *Heidenheimer v. Mayer*, 506.

#### WAIVER.

See CONTRACTS, 6, 7; INSURANCE, 6; JURY TRIAL; TRIAL, 3.

#### WAREHOUSEMEN.

See BAILMENT.

#### WITNESS.

1. Conviction in another State, or foreign country, of an infamous crime, does not render one in-

competent as a witness in this State. *Nat'l Trust Co. v. Roberts*, 100.

2. Where the evidence shows that the fact sworn to is in part true, and in part erroneous, arising from mistake or miscalculation, or excusable exaggeration, the witnesses, as to the fact, are not wholly discredited. *Zimmerman v. Nat'l S. S. Co.*, 539.
3. Evidence purely in support of a witness cannot be given until a necessity has been shown for it by impeachment. *O'Hagan v. Dillon*, 456.
4. When a witness admits having had a conversation, but is not asked the details, another witness cannot be called to testify to the details for the purpose of contradicting first witness. *Ib.*

See EVIDENCE, 5, 25-27.

G. R. L.











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